Supreme Court, U.S.
FILED
97 1560 MAR 20 1998
OFFICE OF THE CLERK

No. ———

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

---

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
*Petitioners,*

v.

KIMBERLY ANN GREENWELL,
*Respondent.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

ARMIN J. MOELLER, JR.
*Counsel of Record*
M. NAN ALESSANDRA
PHELPS DUNBAR, L.L.P.
Suite 500
MTEL Centre North
200 South Lamar Street
Jackson, MS 39201
(601) 352-2300
*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED FOR REVIEW

I. Did the Fifth Circuit clearly violate this Court's mandate in *Harris v. Forklift Systems* and concomitantly create a conflict among the Circuits when it found that two acts of alleged verbal harassment committed over a four-month period satisfy the objectively severe and pervasive harassment element necessary for a hostile environment claim?

II. Did the Fifth Circuit create a conflict among the Circuits and impose an unreasonable burden on employers when it found that an employer responds inadequately to an employee's complaint of sex-based verbal harassment despite the fact that the employer:

   A. Investigated the complaint approximately one week after it was lodged;

   B. Confronted the alleged harasser;

   C. Obtained the alleged harasser's commitment to end the allegedly offensive conduct complained of; and

   D. Took action which ultimately ended the harassment complained of by the employee?

III. Did the Fifth Circuit create an internal conflict, as well as a conflict between itself and the other Circuits, when it found that an employee can prove the existence of a causal connection between her protected activity and her employer's adverse personnel action without rebutting her employer's uncontroverted proof that it had taken the same, if not more severe, disciplinary action against other employees who have not engaged in any protected activity?

## CORPORATE DISCLOSURE STATEMENT

One of the Petitioners, Raytheon Aerospace Company, has a parent corporation, Raytheon Aircraft Company, which is located in Wichita, Kansas. Raytheon Aircraft Company is owned by Raytheon Company which is located in Lexington, Massachusetts. Raytheon Aerospace Company has no subsidiaries, except wholly owned subsidiaries, which need not be identified pursuant to Supreme Court Rule 14.1(b).

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED IN THIS CASE | 2 |
| CONCISE STATEMENT OF THE CASE | 4 |
| A. Facts | 4 |
| B. Proceedings Below | 9 |
| REASONS FOR GRANTING THE WRIT | 12 |
| I. CERTIORARI SHOULD BE GRANTED TO RECTIFY THE FIFTH CIRCUIT'S COMPLETE DEPARTURE FROM THIS COURT'S DIRECTIVE IN *HARRIS v. FORKLIFT SYSTEMS* AND TO PREVENT A CONFLICT AMONG THE CIRCUITS REGARDING THE CONDUCT NECESSARY TO PROVE THE EXISTENCE OF AN OBJECTIVELY HOSTILE WORK ENVIRONMENT | 12 |
| II. PETITION FOR CERTIORARI SHOULD BE GRANTED SO THAT EMPLOYERS WITHIN THE FIFTH CIRCUIT ARE NOT SUBJECT TO STRICT LIABILITY FOR COWORKER HARASSMENT, A STANDARD WHICH CLEARLY CONFLICTS WITH THIS COURT'S MANDATE IN *MERITOR SAVINGS BANK F.S.B. v. VINSON* AND THE OTHER CIRCUITS | 16 |

TABLE OF CONTENTS—Continued

Page

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT CREATED BY THE FIFTH CIRCUIT'S HOLDING THAT AN EMPLOYEE CAN PROVE THE EXISTENCE OF A CAUSAL CONNECTION BETWEEN HER PROTECTED ACTIVITY AND HER EMPLOYER'S ADVERSE PERSONNEL ACTION WITHOUT REBUTTING HER EMPLOYER'S UNCONTROVERTED EVIDENCE THAT IT HAS TAKEN THE SAME, IF NOT MORE SEVERE DISCIPLINARY ACTION AGAINST OTHER EMPLOYEES WHO ENGAGED IN ANY PROTECTED ACTIVITY..... 18

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

*Federal Cases* Page

*Anderson v. Douglas & Lomanson Co.*, 26 F.3d 1277 (5th Cir. 1994) ..... 20
*Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993) ..... 20
*Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995) ..... 12, 13
*Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1996) ..... 12, 13
*Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868 (6th Cir. 1997) ..... 17
*Cooper v. Housing Auth.*, 67 FEP Cas. 617 (N.D. Ala. 1995) ..... 21
*Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167 (10th Cir. 1996) ..... 17
*DeAngelis v. El Paso Municipal Police Officers' Assn.*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 473 ..... 12
*Ellerth v. Burlington Ind.*, 123 F.3d 490 (7th Cir. 1997), *cert. granted in part*, 118 S.Ct. 876 (January 23, 1998) ..... 15, 16
*Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S.Ct. 438 (November 14, 1997) ..... 16
*Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993) ..... 12-15
*Hartsell v. Duplex Products, Inc.*, 123 F.3d 766 (4th Cir. 1997) ..... 12, 13
*Henry v. Guest Services, Inc.*, 902 F. Supp. 245 (D.D.C. 1995), *aff'd*, 98 F.3d 646 (D.C. Cir. 1996) ..... 20
*Lawson v. Getty Terminals Corp.*, 866 F. Supp. 793 (S.D. N.Y. 1994) ..... 21
*Lees v. Case-Hoyt Corp.*, 779 F. Supp. 717 (W.D. N.Y. 1991) ..... 21
*Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996) ..... 20
*Manning v. Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997) ..... 20

TABLE OF AUTHORITIES—Continued

Page

*McKenzie v. Illinois Department of Transport*, 92 F.3d 473 (7th Cir. 1996) ..... 20
*Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986) ..... 18
*Nash v. Electrospace, Inc.*, 9 F.3d 401 (5th Cir. 1993) ..... 17
*Oncale v. Sundowner Offshore Services, Inc.*, 2 —— U.S. ——, ——, S.Ct. ——, 1998 WL 88039 (U.S. La.) (March 4, 1998) ..... 14, 15
*Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997) ..... 20
*Perry v. Ethan Allen*, 115 F.3d 143 (2nd Cir. 1997) ..... 17
*Southard v. Texas Board of Criminal Justice*, 124 F.3d 539 (5th Cir. 1997) ..... 13
*Williams v. Conoco, Inc.*, 860 F.2d 1306 (5th Cir. 1988) ..... 14
*Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271 (5th Cir. 1989) ..... 14

*Federal Statutes*

28 U.S.C. § 1254(1) ..... 2
42 U.S.C. § 1981a ..... 10, 11
42 U.S.C. § 2000e, et seq. (Title VII) ..... 2

*Federal Rules of Civil Procedure*

Fed. R. Civ. P. 51 ..... 13
Fed. R. Civ. P. 59 ..... 11

*Federal Rules of Evidence*

Fed. R. Evid. 408 ..... 11

*Other Statutes*

Louisiana Civil Code Article 2315 ..... 10
Louisiana Revised Statute § 23:1006(B)(1) ..... 3
Louisiana Revised Statute § 51:2256(1) ..... 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

---

No. ———

---

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
*Petitioners,*

v.

KIMBERLY ANN GREENWELL,
*Respondent.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

---

Raytheon Aerospace, Inc. and Wayne Leese respectfully petition this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 97-30002 (United States Court of Appeals for the Fifth Circuit, December 22, 1997).

## OPINIONS BELOW

On December 2, 1997, the United States Court of Appeals for the Fifth Circuit issued its opinion (Pet. App. at 1a-2a) affirming in part, and vacating in part, the district court's December 9, 1996 Order denying Petitioners' Motion for Judgment as a Matter of Law (Pet. App. 3a-11a).

## JURISDICTION

The opinion, which constitutes its judgment, of the United States Court of Appeals for the Fifth Circuit, was

entered on December 22, 1997. The Certiorari jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), which relates to the Plaintiff's, Greenwell's, federal law hostile environment claim against Raytheon is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The statute pertaining to Greenwell's Title VII retaliation claim against Raytheon is 42 U.S.C. § 2000e-3(a). The pertinent provision of that statute is set forth below:

> § 2000e-3(a) Other Unlawful employment practices
>
> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicants for membership, because he has opposed

> any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

The pertinent provision of the Louisiana Code which relates to Greenwell's state law hostile environment claim against Raytheon is Louisiana Revised Statute § 23:1006 (B)(1). The relevant portion of that statute is set forth below:

> § 1006. Intentional discrimination in employment
>
> B. It shall be unlawful discrimination in employment for an employer to:
>
> > (1) Intentionally fail or refuse to hire, refer, discharge, or to otherwise intentionally discriminate against or in favor of an individual with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin.

The pertinent provision of the Louisiana Code which relates to Greenwell's state law retaliation claims against Raytheon and Leese is Louisiana Revised Statute § 51:2256(1). The relevant portion of that statute is set forth below:

> § 2256. Conspiracy to violate this Chapter unlawful
>
> It shall be an unlawful practice for a person or for two or more persons to conspire:
>
> > (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this Chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

## CONCISE STATEMENT OF THE CASE

### A. Facts

Greenwell began her employment with Raytheon in November 1990 as a mechanic at Raytheon's Moffet Field facility in California. The company later transferred her to its Fort Ord facility where she remained until her promotion as leadperson at Raytheon's New Orleans, Louisiana facility located at the Lakefront Airport ("Lakefront"). As leadperson, Greenwell was responsible for servicing one aircraft, a "C-12," which was owned by Raytheon's only customer at Lakefront, the Louisiana Army National Guard (the "Guard"). After completion of training school in August 1992, Greenwell assumed her duties at Lakefront.[1]

Since the Guard had never hired an outside contractor to service its aircraft at Lakefront, there was an expected adjustment period between the Guard and Raytheon. This adjustment period began without incident, but soon changed when Greenwell demanded additional office space and a reserved parking spot even though Raytheon's contract with the Guard did not obligate it to furnish such amenities. Shortly thereafter, Greenwell learned that a Guard employee, Michael Boudreaux, had referred to her as the "BASI-bitch" outside of her presence.[2] About this time, two other Guard employees, Major Tom Mix and COR[3] Norris Babin, allegedly referred to Greenwell as "little girl" and/or "BASI-gal."

---

[1] Greenwell also supervised Jim Stout, a mechanic who arrived at Lakefront in November 1992. Stout was Raytheon's only other employee at Lakefront.

[2] The "BASI" portion of the "BASI-bitch" term refers to Raytheon's former name, Beech Aerospace Services, Inc. Boudreaux allegedly made this statement in September 1992.

[3] "COR" refers to Contracting Officer Representative.

Greenwell reported the above-referenced comments to her supervisor, Walt House. On September 29, 1992, House met with Colonel Nuss, the highest ranking Guard officer at Lakefront, and obtained Nuss' assurance that such conduct would not be tolerated. Greenwell was admittedly satisfied with House's action and his meeting with Nuss. However, the tension between Greenwell and the Guard grew over the next few months as the Guard employees became more dissatisfied with Greenwell's technical competence and her uncooperative attitude. The Guard employees observed no less than ten separate mechanical problems during her tenure at Lakefront.[4] Despite these problems, the Guard did not initially complain to Raytheon because they wanted to afford Greenwell an opportunity to learn how to service the aircraft.[5] Nonetheless, by April 1994, the Guard's patience had worn thin as evidenced by a disagreement between Greenwell and COR Babin over the removal of tape from the Guard's hangar floor.

This April 1994 dispute began when Babin used tape to mark a spot where the plane should rest while it was temporarily stored at a different location in the hangar. The Guard informed Greenwell that the tape had to be removed in one week. However, Greenwell did not remove the tape after the week expired which prompted Babin to tell Greenwell to "get the damn tape off the floor." Greenwell removed the tape, but she charged the Guard with two hours of "non-reporting time" on her monthly status report for the time spent removing tape.[6]

---

[4] Those problems included: (1) fuel leakage through the plane's wing panels; (2) detachment of the forward cowlings during flight; and (3) malfunctions in the navigation system, engine, landing gear, and brakes.

[5] Guard pilots Babin and Keeling frequently took Greenwell on flights so she could gain more insight into the C-12's various mechanical problems.

[6] By including this time as "non-reporting time", Greenwell prevented such time from reducing her "operational readiness" or "OR" rate, one of the criteria by which she was evaluated.

Babin then informed "ATCOM"[7] that Greenwell charged the Guard with "non-reporting time," and ATCOM called Raytheon to complain about this incident. After Greenwell's new supervisor, Wayne Leese, learned about this incident, he told Greenwell she should not have charged the Guard with "non-reporting time." Greenwell responded by informing Leese that Babin had used a loud tone of voice when he requested her to remove the tape, and Greenwell told Leese she considered this sexual harassment. Before this incident, Greenwell had never complained to Leese about Babin's, or the Guard's, alleged sexual harassment.

Approximately one week later, Leese traveled to Lakefront to investigate Greenwell's sexual harassment complaint.[8] Leese interviewed several Guard employees, including Babin and Michael Boudreaux. Leese also confronted Colonel Nuss with Greenwell's complaints. Nuss and Babin then advised the Guard employees that any inappropriate conduct or language would not be tolerated.

After Leese concluded his investigation, he drafted a report regarding Greenwell's complaints and his response thereto. Leese's report stated that Greenwell no longer considered Babin's statement about the tape to be sexual harassment, but she still considered the "BASI-bitch" comment to be sexual harassment, even though it occurred 18 months earlier. (Pet. App. at 16a). Greenwell read Leese's report, signed it, and never recanted her ratification of that report until after filing her lawsuit.

Approximately two months later, Guard pilot Barry Keeling and an instructor pilot, John Fowler, took the C-12 out for a routine flight. They were about 6,000 feet

---

[7] ATCOM is the acronym for Army Aviation Troop Command, the agency responsible for supplying and maintaining the Army's equipment.

[8] Leese was temporarily delayed because he had to attend an important meeting with the Navy in Pensacola, Florida.

up when they smelled smoke in the cockpit. Keeling turned around but could barely see because the cockpit was filled with smoke. Keeling contacted a nearby Austin, Texas control tower and obtained clearance for an emergency landing which he safely performed.

After Keeling landed the plane, he requested that a mechanic from Raytheon's nearby facility inspect the plane's blower and air conditioning system because the air conditioner had not worked for over a month. Raytheon's mechanic found serious problems in the air conditioning system.[9] Since Greenwell's subordinate, Stout, was on vacation the entire week before this emergency landing, Greenwell was the only person who could have worked on the air conditioner before Keeling's July 12, 1994 departure.[10]

After Raytheon's Austin, Texas mechanic informed Babin of these critical mechanical problems, Babin called Raytheon's headquarters and reported the serious deficiencies.[11] Raytheon informed Babin that the Guard must put their complaints in writing before Raytheon would review them. Shortly thereafter, COR Babin, Major Keeling, Colonel Nuss, Major Mix and former Assistant COR Boudreaux, forwarded written complaints to Raytheon regarding Greenwell's deficient performance. (Pet. App. at 17a-26a).

After Raytheon's Human Resource Director, Bill Ogle, reviewed the Guard's letters with the Operations Department, Raytheon decided to transfer Greenwell from Lakefront because Raytheon's practice had always been to

---

[9] These problems included cross-threaded tubing, an improperly placed coil, deformed fittings and "Pro-seal" on the fittings.

[10] Greenwell admitted her error in placing Pro-seal on the fittings.

[11] Although Babin had not complained about Greenwell's mechanical skills before, he now realized that something had to be done to ensure the Guard's pilots' safety.

remove an employee following a customer's complaint.[12] Thus, on July 28, 1994, Raytheon transferred Greenwell to a mechanic's position at its Belle Chasse, Louisiana facility.[13]

Greenwell thereafter obtained the Guard's complaint letters and responded with a rebuttal letter in which she claimed that the Guard's complaints were either untrue or exaggerated. Bill Ogle recommended that she provide Raytheon's Operations Department with a copy of her rebuttal letter because Ogle had limited knowledge regarding the mechanical issues discussed therein. Inexplicably, Greenwell rejected Ogle's offer and would not allow him to forward her rebuttal letter to Raytheon's Operations Department.

In August 1994, Wayne Leese gave Greenwell a "below average" rating in quality and accuracy of work based on the C-12's air conditioning problems, the Guard's complaints and 94-96 "discrepancies" found during Leese's May 1994 inspection.[14] Leese gave Greenwell satisfactory ratings in all other categories. Greenwell nonetheless disputed Leese's evaluation even though she suffered no loss of pay or benefits following it.

On October 5, 1994, Lance Fachman, Greenwell's supervisor at Belle Chasse, discovered that she and a coworker, Dave Burlette, overtorqued 75-100 "C-flange" bolts on an aircraft. Overtorquing these bolts was a potentially serious error because it could cause the engine to break apart while the plane was in the air. Shortly after October 5, 1994, Fashman mentioned this incident to his

---

[12] Raytheon's removal practice had been adopted because it was ultimately responsible if any of its customers' employees were injured due to a mechanical defect in an airplane.

[13] Greenwell's transfer resulted in a $4,368.00 per year salary reduction.

[14] Greenwell had already assumed her position at Bell Chasse when Leese performed his August 1994 evaluation.

supervisor, Wayne Leese. Leese responded by telling Fachman that this infraction had to be documented pursuant to Raytheon's policy. However, Fachman did not believe documentation was necessary, and he therefore failed to follow Leese's instruction. Once Leese learned of Fachman's inaction, he again instructed Fachman to record the employees' error. Fachman thereafter complied by documenting both employees' errors.[15]

In February 1995, Raytheon's new Vice President of Operations, Dave Robinson, began investigating Greenwell's claims and the reasonableness of reinstating her as leadperson at Lakefront.[16] On February 22, 1995, Robinson contacted Greenwell to relay his initial findings. In doing so, he told Greenwell that, in general, it would be difficult for an employer to perceive a litigious employee as not "biting the hand that feeds him." Robinson then told Greenwell she had two paths to choose from: (1) she could look to resolve her claims with his help; or (2) she could litigate which would make it difficult for him to help her because "everything would have to be washed through the legal process." After Greenwell's counsel learned of Robinson's offer, she prohibited him from speaking with Greenwell again, thereby terminating Robinson's reconciliation efforts. Two months later, Greenwell resigned from Raytheon.

**B. Proceedings Below**

On July 3, 1995, Greenwell filed her Complaint in the Federal District Court for the Eastern District of Louisiana against Defendants Raytheon, Wayne Leese and Dave Robinson. Greenwell claimed that Raytheon violated both

---

[15] Fachman's memo regarding the overtorquing incident did not affect either Burlette's or Greenwell's pay, benefits, or promotion status.

[16] Robinson was investigating this issue in response to Greenwell's attorney's demand for her reinstatement as leadperson at Lakefront.

Title VII and Louisiana Revised Statute § 23:1006 by subjecting her to a sex-based hostile work environment. Greenwell also sued Raytheon for retaliatory demotion under Title VII and Louisiana Revised Statute § 51:2256. Finally, Greenwell sued Raytheon for intentional infliction of emotional distress under Louisiana Civil Code Article 2315. Additionally, Greenwell sought punitive damages against Raytheon for her Title VII claims pursuant to 42 U.S.C. § 1981a.

At trial, Raytheon moved for directed verdict on all of the Plaintiff's claims. This district court granted Raytheon's motion on the Plaintiff's intentional infliction claim, but it denied Raytheon's motion on her federal and state law claims for sex and retaliation discrimination. The Court also denied Raytheon's motion on the Plaintiff's punitive damage claim. After trial, the jury returned a compensatory damages verdict of $100,000 against both Defendants Raytheon and Leese.[17] The jury also assessed a $500,000 punitive damage award against Raytheon pursuant to 42 U.S.C. § 1981a.

Plaintiff sued Defendant Leese for retaliation under Louisiana Revised Statute § 51:2256 and for intentional infliction of emotional distress under Louisiana Civil Code Article 2315. At trial, Leese moved for directed verdict on both of these claims, and the district court granted Leese's motion on the intentional infliction claim. However, the district court sent the retaliation claim to the jury, and the jury returned its verdict against Leese for $100,000.[18]

Finally, Greenwell sued Defendant Robinson under the same state statutes as Leese. The district court granted Robinson's motion for summary judgment on the inten-

---

[17] As discussed below, the jury found Leese jointly liable for these damages.

[18] *See* n.17, *supra.*

tional infliction claim, and the court later granted Robinson's motion for directed verdict on the retaliation claim.

The district court thereafter entered judgment in accordance with the jury's verdict, but it also added a backpay award of $7,520 against Defendants Raytheon and Leese. (Pet. App. at 12a-13a). Defendants thereafter jointly moved for judgment as a matter of law contending that there was insufficient evidence to support the jury's verdict.[19] Additionally, Raytheon moved for directed verdict because it contended that the district court erroneously admitted testimony regarding Robinson's February 22, 1995 statements with Greenwell pursuant to Fed. R. Evid. 408, and that this admission substantially prejudiced its rights. The district court denied all of the Defendants' post-trial motions except for partially granting Raytheon's request for a remittitur of the punitive damage award as the court reduced that award from $500,000 to $300,000 based on its reconciliation of the jury's verdict and the damages cap in 42 U.S.C. § 1981a. (Pet. App. at 14a-15a).

In its December 22, 1997 opinion, the Fifth Circuit affirmed the district court's rulings and entered an order denying Defendants' motion for judgment as a matter of law except in one respect. The Fifth Circuit reversed the lower court's finding that sufficient evidence existed for a punitive damage award under 42 U.S.C. § 1981a.

Petitioners now seek review of this Court.

---

[19] Alternatively, Defendants requested a new trial pursuant to Fed. R. Civ. P. 59. However, the Court also denied this request.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO RECTIFY THE FIFTH CIRCUIT'S COMPLETE DEPARTURE FROM THIS COURT'S DIRECTIVE IN *HARRIS v. FORKLIFT SYSTEMS* AND TO PREVENT A CONFLICT AMONG THE CIRCUITS REGARDING THE CONDUCT NECESSARY TO PROVE THE EXISTENCE OF AN OBJECTIVELY HOSTILE WORK ENVIRONMENT.

In affirming the district court, the Fifth Circuit completely departed from this Court's directive in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370 (1993), the Fifth Circuit's own precedent in *DeAngelis v. El Paso Mun. Police Officers' Assn.*, 51 F.3d 591, 593 (5th Cir. 1995), *cert. denied* —— U.S. ——, 116 S.Ct. 473, and at least three other Circuit Courts of Appeal. *See Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995). The Fifth Circuit departed from *Harris*, and the other Circuits identified *supra*, when it found that two instances of minor verbal harassment over a four-month period was sufficiently severe and pervasive conduct "to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive. . ." *Harris, supra* at 21.

In this case, the Plaintiff presented but two acts of non-time barred harassment in support of the "objectively severe and pervasive conduct" element of her hostile environment claim: [20] (1) COR Norris Babin told her "to

---

[20] The plaintiff testified about the "BASI-bitch" comment and other instances of alleged verbal harassment occurring before April 1, 1994. However, the district court correctly instructed the jury that any pre-April 1, 1994 conduct was not actionable and could only be used to determine whether the post-April 1, 1994 conduct complained about was motivated by Greenwell's sex or her complaints about alleged sexual harassment. The district court in-

get the damn tape off the floor" in late April 1994; and (2) Greenwell's subordinate, Jim Stout, stated that he wished Plaintiff were Kim Basinger instead of Kim Greenwell during the summer of 1994.[21] Clearly, these two instances of alleged verbal harassment cannot possibly satisfy the objectively severe and pervasive harassment standard promulgated by this Court in *Harris* and applied by the Circuits. *See Southard v. Texas Bd. of Criminal Justice*, 124 F.3d 539, 555 (5th Cir. 1997) (finding that a few instances of verbal harassment and requests for performance of menial tasks did not satisfy objectively severe and pervasive harassment standard); *Hartsell, supra* at 772-73 (co-workers' immature, insensitive and insulting comments were insufficient to create objectively hostile work environment); *Black, supra* at 826 (reversing jury verdict in favor of employee on hostile environment claim because male co-workers' comments were offensive, inappropriate and unprofessional, but insufficiently severe or pervasive to prove hostile environment claim); *Baskerville, supra* at 430-31 (reversing jury verdict because several instances of verbal harassment over a seven-month period were insufficiently severe or pervasive to create objectively hostile work environment).

On appeal, the Plaintiff recognized the complete paucity of evidence supporting the objectively abusive conduct element of her hostile environment claim because she offered a previously unasserted theory in support thereof. Greenwell claimed that the Guard's July 1994 complaint letters regarding her deficient mechanical skills and uncooperative behavior were sufficient, by themselves, to have created an objectively hostile work environment.

---

structed the jury in this manner because the pre-April 1, 1994 conduct was outside the applicable statutes of limitation. Since the Plaintiff never objected to this instruction, she waived any alleged error in it pursuant to Fed.R.Civ.P. 51.

[21] Although Greenwell testified about Stout's comment, she never contended that this statement constituted actionable sex-based harassment.

However, the Plaintiff overlooked one very critical fact: these letters could not have created an objectively hostile work environment at *Lakefront* because the Guard's letters were not communicated or provided to Greenwell until *after* Raytheon transferred her from Lakefront. This critical distinction also prevented Greenwell from proving that she subjectively perceived these letters as creating a hostile work environment, another requirement for establishing her claim. *Harris, supra*, at 21-22. Accordingly, this novel theory did not, and cannot, cure the otherwise deficient proof offered to show that Raytheon subjected Greenwell to an objectively hostile work environment.[22]

Finally, this case, more than any other this Court will see, cries out for refinement of the "objectively hostile or abusive work environment" standard articulated in *Harris*.[23] Justice Scalia was most prophetic when he candidly addressed the problems created for employers and the lower courts by *Harris*' definition of hostile work environment:

> [a]busive (or hostile, which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "[reasonable person['s]" notion of what the vague word means. . . . As a practical

---

[22] The same analysis above would also be applicable to Greenwell's state law hostile environment claim as the Fifth Circuit has correctly found that Louisiana's anti-discrimination statutes are interpreted like their federal counterpart, Title VII, because of their similarity in scope and purpose. *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5th Cir. 1989); *Williams v. Conoco, Inc.*, 860 F.2d 1306-07 (5th Cir. 1988).

[23] This Court recently reaffirmed its commitment to the "objectively hostile or abusive work environment" standard when it found this element to be "crucial" in preventing both judges and juries from converting otherwise isolated, innocuous comments into discriminatory "conditions of employment." *Oncale v. Sundowner Offshore Services, Inc.*, —— U.S. ——, —— S.Ct. ——, 1998 WL 88039 at p. 4 (U.S. La.) (March 4, 1998).

> matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.

*Harris, supra* at 24 (Scalia, J., concurring). *See also Ellerth v. Burlington Ind.*, 123 F.3d 490, 501 (7th Cir. 1997) (*en banc*) *cert. granted in part*, 118 S.Ct. 876 (January 23, 1998) (lamenting the difficulty which both employers and courts have had, and will continue to have, in determining conduct necessary to create a hostile work environment). Justice Scalia's concern over this issue was, and never will be more, fully realized than in the instant case.[24] Further, this court, the lower courts, and the nation have, willingly or not, been forced to confront the issue of what constitutes actionable sexual harassment. (Pet. App. 27a-49a).[25] Accordingly, the instant case presents this court with a perfect opportunity to not only prevent a split in the circuits, but to articulate a definition of actionable sexual harassment which will prevent the further "opening of more expansive vistas of litigation" as Justice Scalia astutely predicted some five years ago. *See Harris, supra* at 24.

---

[24] This Court also recently explained that "common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff's position would find *severely* hostile or abusive." *Oncale, supra* at p. 4 Petitioners agree that such common sense *should* prevail, but as demonstrated herein, both the jury and lower courts omitted it from their determinations.

[25] As reflected by recent articles attached hereto, neither lay people nor legal scholars truly understand what is legally proscribed sexual harassment. This problem is compounded by the fact that the EEOC reports that the number of sexual harassment complaints has doubled since 1991. (Pet. App. at 30a). Further, a June, 1997 *CNN/USA Today Weekend* poll found that 15% of all adults are either "afraid" or very afraid" or being accused of sexual harassment. Such fear undoubtedly stems from the fact that most of those polled do not comprehend (and/or fear others do not comprehend) the definition of actionable sexual harassment.

## II. PETITION FOR CERTIORARI SHOULD BE GRANTED SO THAT EMPLOYERS WITHIN THE FIFTH CIRCUIT ARE NOT SUBJECT TO STRICT LIABILITY FOR COWORKER HARASSMENT, A STANDARD WHICH CLEARLY CONFLICTS WITH THIS COURT'S MANDATE IN *MERITOR SAVINGS BANK F.S.B. v. VINSON* AND THE OTHER CIRCUITS.

By affirming the district court, the Fifth Circuit essentially found that once an employee is allegedly harassed by a coworker, or as in this case, a customer, her employer is strictly liable for that harassment, irrespective of the employer's response thereto.[26] That inescapable conclusion is established by the following facts:

1. Greenwell complained to Wayne Lease in late April 1994 about Norris Babin's loud request for her to remove tape from the hangar floor;[27]
2. Leese investigated her complaints in early May 1994;[28]
3. Leese confronted the alleged harasser, the Guard;
4. Leese obtained the Guard's commitment to end the allegedly offensive conduct complained of; and

---

[26] This Court has already granted certiorari on two cases to resolve the standard by which an employer incurs liability for a supervisory employee's creation of a sexually hostile work environment. *See Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (*en banc*) (*cert. granted*, 118 S. Ct. 438) and *Ellerth*, *supra*.

[27] On appeal, Greenwell claimed that Raytheon was also liable for her former supervisor's, Walt House's, alleged failure to remedy the Guard's pre-April 1, 1994 conduct, i.e., the "BASI-bitch," "little girl" comments. However, the district court properly instructed the jury that Leese's alleged inaction, like the other pre-April 1, 1994 conduct, was not actionable because it was outside the applicable statute of limitations.

[28] Greenwell was admittedly satisfied with the promptness of Leese's response.

5. Leese's action ended the alleged harassment complained of by Greenwell.[29]

Although this Court has never directly addressed the adequacy of an employer's response to a sexual harassment complaint, the Fifth Circuit, like the other Circuits, has. Prior to this case, the Fifth Circuit has held that an employer must take action reasonably calculated to end harassment of which it should have known. *Nash v. Electrospace, Inc.*, 9 F.3d 401, 403-04 (5th Cir. 1993). Clearly, the panel in the instant case completely deviated from its own precedent in finding that Leese's action was not "reasonably calculated to end" Greenwell's complaint about the Guard's alleged harassment as Leese's response was not only reasonably calculated to end such harassment, but it in fact ended such harassment. Thus, the Fifth Circuit essentially imposed strict liability on Raytheon, and by doing so, it created an internal conflict and a conflict between itself and the other Circuits. *See Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 873 (6th Cir. 1997) (employer is only liable for reckless indifference to employee's harassment complaint as negligent, good faith, response insulates employer from liability); *Perry v. Ethan Allen*, 115 F.3d 143, 149 (2nd Cir. 1997) (employer is only liable if it provides no reasonable avenue of complaint or does nothing about known harassment; *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir. 1996) (employer incurs liability for recklessly or negligently failing to remedy harassment of which it knew, or should have known). Moreover, the Fifth Circuit's ruling in this case violated this Court's mandate that employers are not "automatically liable" for

---

[29] After Leese's investigation and meeting with the Guard was complete, the Guard did not subject Greenwell to any other acts of alleged verbal harassment. However, Jim Stout, Greenwell's subordinate, stated that he wished she were Kim Basinger instead of Kim Greenwell, but Greenwell rightfully never contended that Stout's statement was actionable sex-based harassment.

sexual harassment. *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408 (1986).

On appeal, Greenwell recognized the deficiency of proof offered to show that Raytheon and/or Leese inadequately responded to her April 1994 harassment complaint as she asserted that Leese's action was deficient because he failed to prevent the Guard employees from sending their July 1994 complaint letters. Greenwell's argument is completely meritless unless one accepts the two illogical precepts underlying it: (1) Raytheon somehow should have stopped the Guard from complaining about her deficient maintenance of the C-12, a deficiency which nearly caused the death of two Guard pilots; and (2) Raytheon should have anticipated such action from the Guard and preempted it even though neither Greenwell, nor the Guard, had done anything to place Raytheon, or Leese, on notice that the Guard would falsely complain about her performance. Further, the law does not require an employer to possess such clairvoyancy. *Nash, supra* at 404 (finding that employer is not liable for failure to rectify harassment of which it had no reason to know). Accordingly, there was no evidentiary or legal basis for the Fifth Circuit to conclude that Raytheon took inadequate action in response to Greenwell's April 1994 complaint.

## III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT CREATED BY THE FIFTH CIRCUIT'S HOLDING THAT AN EMPLOYEE CAN PROVE THE EXISTENCE OF A CAUSAL CONNECTION BETWEEN HER PROTECTED ACTIVITY AND HER EMPLOYER'S ADVERSE PERSONNEL ACTION WITHOUT REBUTTING HER EMPLOYER'S UNCONTROVERTED EVIDENCE THAT IT HAS TAKEN THE SAME, IF NOT MORE SEVERE, DISCIPLINARY ACTION AGAINST OTHER EMPLOYEES WHO HAVE NOT ENGAGED IN ANY PROTECTED ACTIVITY.

Greenwell asserted that Raytheon was liable for unlawful retaliation under state and federal law because it

transferred and demoted her following Greenwell's April 1994 complaints regarding the Guard's alleged verbal harassment. However, Raytheon provided uncontroverted proof that it had taken the same, if not more severe, disciplinary action against other employees about whom its customers had complained.[30] As for defendant Leese, Greenwell claimed that he had given her a worse performance evaluation than she deserved in August 1994, and that he recommended the documentation of an admitted mechanical error in October 1994 in retaliation for her complaints about the Guard's alleged harassment.[31] As with Raytheon, Leese also provided uncontroverted proof that he took the same action against two of Greenwell's former coworkers, Jim Stout and Dave Burlette, as he took against her.[32]

To establish her retaliation claims against both Raytheon and Leese, Greenwell had to prove:

1. that she engaged in protected activity;
2. that an adverse employment action occurred; and
3. that a causal link existed between her protected activity and the adverse employment action.

---

[30] The uncontroverted proof was that Raytheon had not only transferred and demoted employees about whom customers had complained, but that it had also terminated employees about whom customers had complained.

[31] The October 1994 admitted mechanical error was Greenwell's overtorquing of the C-flange bolts on an aircraft located at the Belle Chasse facility. Neither of Leese's allegedly adverse employment actions caused a reduction in Greenwell's pay or benefits.

[32] Leese gave Jim Stout, Greenwell's subordinate at Lakefront, the identical personnel evaluation he had given Greenwell for 1994. Likewise, Leese recommended that Lance Fachman document not only Greenwell's overtorquing of the C-flange bolts but also Burlette's overtorquing of the C-flange bolts.

*Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996).[33] Both Raytheon and Leese argued that Greenwell had not met her burden of proving the causal connection element of her claim because she had wholly failed to rebut the defendants' proof that they had taken the same disciplinary action against other employees who had not engaged in any protected activity. The Fifth Circuit had previously agreed with the Petitioners' defense on two occasions when it found an employee cannot prove the necessary causal connection when uncontroverted evidence showed that the employer had taken the same action against other employees who had not engaged in any protected conduct. *Anderson v. Douglas & Lomanson Co.*, 26 F.3d 1277, 1300-1302 (5th Cir. 1994); *Armstrong v. City of Dallas*, 997 F.2d 62, 66-67 (5th Cir. 1993).

In adopting the aforementioned rule in *Anderson* and *Armstrong*, the Fifth Circuit fell in line with the other Circuits which have addressed this issue. *See Penny v. United Parcel Service*, 128 F.3d 408, 417 (6th Cir. 1997) (finding that plaintiff's failure to show evidence of disparate treatment once employer offered evidence of similar disciplinary action precluded plaintiff from proving causal connection); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 693 (8th Cir. 1997) (plaintiff's failure to show disparate treatment of similarly situated non-complaining employees was fatal to proving causal connection); *Henry v. Guest Services, Inc.*, 902 F. Supp. 245, 252 (D.D.C. 1995), *aff'd.*, 98 F.3d 646 (D.C. Cir. 1996) (same); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 484 (7th Cir. 1996) (same). Likewise, numerous district courts have also concluded that an employee will not meet his burden of proving the necessary causal

---

[33] As with Greenwell's state law hostile environment claims against Raytheon, Greenwell's state law retaliation claims have been evaluated similarly to her federal retaliation claims because of the similarity in scope and purposes of Louisiana's anti-discrimination statutes and Title VII. See n.22 *supra*.

connection for a retaliation claim when his employer provides unrebutted evidence that it has taken the same disciplinary action against similarly situated non-complaining employees. *Cooper v. Housing Auth.*, 67 FEP Cas. 617, 619 (N.D. Ala. 1995); *Lawson v. Getty Terminals Corp.*, 866 F. Supp. 793, 803-04 (S.D.N.Y. 1994); *Lees v. Case-Hoyt Corp.*, 779 F. Supp. 717, 727 (W.D.N.Y. 1991).[34]

Ignoring its own precedent, as well as that of the other Circuits and lower federal courts, the Fifth Circuit created a conflict herein when it found that Greenwell met her burden of proving a causal connection even though she offered no evidence rebutting Raytheon's proof that it had taken the same, if not more severe, disciplinary action against other non-complaining employees. Accordingly, this Court should grant certiorari to remove the uncertainty and conflict created by the Fifth Circuit's decision in the instant case and to articulate the proof necessary to establish a causal connection between an employee's protected activity and his/her employer's adverse personnel action.

## CONCLUSION

Undoubtedly, the Plaintiff will respond to this Petition by arguing that this court should deny certiorari because the lower court decisions were unpublished and therefore lack any meaningful precedential value. However, this court has reviewed numerous unpublished decisions, especially those, like the instant one, which have "so far departed from the accepted and usual course of judicial proceedings, . . ., as to call for an exercise of this Court's supervisory powers." *See* S. Ct. R. 10(a). Indeed, the fact that the lower courts' decisions may escape further

---

[34] Petitioners' review of this Court's precedent revealed no decision in which this Court had addressed the proof necessary to support the causal connection element for a retaliation claim.

review because of their unpublished status only enhances the need for this Court's review. Accordingly, for this reason and all other reasons set forth herein, the Petitioners respectfully request the Court to issue a writ of certiorari in this case. Alternatively, if this Court renders an intervening decision in any of the cases that are presently under review which limits the Petitioners' liability, then Petitioners request that this Court vacate the lower court's judgment and remand for proceedings consistent therewith.

Respectfully submitted,

ARMIN J. MOELLER, JR.
*Counsel of Record*
M. NAN A'LESSANDRA
PHELPS DUNBAR, L.L.P.
Suite 500
MTEL Centre North
200 South Lamar Street
Jackson, MS 39201
(601) 352-2300
*Attorneys for Petitioners*

**APPENDIX**

[Filed Dec. 22, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 97-30002

---

KIMBERLY ANN GREENWELL,
*Plaintiff-Appellee,*

versus

RAYTHEON AEROSPACE, INC., *et al.*,
*Defendants,*

RAYTHEON AEROSPACE, INC. and WAYNE LEESE,
*Defendants-Appellants.*

---

Appeal from the United States District Court
for the Eastern District of Louisiana
(95-CV-2138)

---

Before DAVIS, JONES and DENNIS, Circuit Judges

PER CURIAM *

Appellants Raytheon Aerospace, Inc. ("Raytheon") and Wayne Leese ("Leese") appeal a jury verdict in favor

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of Kimberly Ann Greenwell on her claims of sex-based discrimination under Title VII and Louisiana anti-discrimination laws.

Having considered the oral and written arguments of counsel and the record in this case, we see no reversible error in the rulings or judgment of the district court, except as to the award of punitive damages. With respect to the latter issue, however, we conclude that the plaintiff failed to present sufficient evidence from which a reasonable trier of fact could conclude that Raytheon engaged in discriminatory practices "with malice or with reckless indifference to the federally protected rights of [the plaintiff appellee]." 42 U.S.C. § 1981a(b)(1); *see Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996).

Accordingly, the judgment of the district court is REVERSED in part, to vacate the award of punitive damages, and AFFIRMED in all other respects.

Minute Entry [Entered Dec. 9, 1996]
Duval, J.
December 5, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

---

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

---

Before the court are defendants' Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial, pursuant to Federal Rules of Civil Procedure 50(b) and 59, and Motion for Relief from Judgment, pursuant to Federal Rule of Civil Procedure 60.[1] Both motions were set for hearing on October 16, 1996, and were taken on the papers. Having reviewed the record and the memoranda, the court finds that only the demand for remittitur contained in defendants' motion has any merit; all other bases for post-trial relief shall be denied.

A brief review of the case is in order. Plaintiff Kimberly Ann Greenwell filed suit against defendants Raytheon Aerospace Company ("Raytheon"), Dave Robinson and Wayne Leese for alleged sexual harassment, sex discrimination, retaliation, under Title VII and state law.

---

[1] Also submitted on October 16, 1996 was defendants' Motion for Stay of Execution or Enforcement of Judgment. Pursuant to its October 18, 1996 Minute Entry, the court denied a motion to stay execution or enforcement of the judgment and ordered defendants to post a bond in the amount of $407,520.00.

Raytheon employed Greenwell since 1990. In 1994, while working as lead person for Raytheon on a maintenance contract between Raytheon and the Louisiana Army National Guard, Greenwell claimed that she was subjected to sex-based discrimination and harassment from certain National Guard personnel at her job. Greenwell filed a formal complaint in 1994. Three months later, Raytheon demoted and transferred plaintiff to the Naval Air Station at Belle Chasse purportedly due to her unsatisfactory job performance. Plaintiff filed suit in federal court on July 6, 1995. This case proceeded to trial on August 27, 1996. On August 30, 1996, the jury rendered its verdict in favor of plaintiff Greenwell and against the only remaining defendants, Raytheon and Wayne Leese, in the amount of $600,000.00 finding both sex-based harassment and retaliation. The court entered a judgment in the amount of $607,250.000 which reflected awards of back-pay, compensatory and punitive damages.

Now defendants move the court to grant them post-trial relief from the judgment. In rendering its verdict the jury completed a detailed set of interrogatories indicating the basis for relief as to each defendant, as follows:

> 1) Raytheon discriminated against or harassed plaintiff on the basis of her sex in violation of federal law;
>
> 2) Raytheon discriminated against or harassed plaintiff on the basis of her sex in violation of state law;
>
> 3) Raytheon unlawfully retaliated against plaintiff in violation of federal law;
>
> 4) Plaintiff unlawfully retaliated against plaintiff in violation of state law;
>
> 5) Wayne Leese unlawfully retaliated against plaintiff in violation of state law;
>
> 6) Plaintiff was entitled to $100,000.00 in compensatory damages;

7) Raytheon acted willfully or with reckless disregard to plaintiff's rights in discriminating against her or retaliating against her;

8) Plaintiff was entitled to an award of $500,000.00 in punitive damages against Raytheon.

Defendants seek post trail relief on based on the following reasons:

1) Plaintiff failed to prove there was a hostile environment in order to sustain her sexual harassment claim;

2) Plaintiff failed to prove severe or pervasive sexual harassment existed at the Lakefront facility in order to prove that there was a hostile environment;

3) Plaintiff failed to prove that Raytheon's investigation of her formal complaint was inadequate, and thus show that they failed to take remedial action;

4) Plaintiff failed to prove retaliation against Raytheon in part because she failed to prove the reasons for her demotion and transfer were pretextual;

5) Plaintiff failed to prove retaliation against Leese because she failed to prove that he undertook an adverse employment action against her;

6) Plaintiff failed to prove her claim for punitive damages because an employer is not required to pay punitive damages in a "mixed motive" sex discrimination case;

7) Plaintiff failed to prove her claim for punitive damages because she failed to prove that Raytheon acted with malice or reckless indifference with respect to her federal rights;

8) The jury award should be reduced based on the statutory caps imposed on awards of punitive dam-

> ages awarded in Title VII cases under 42 U.S.C. § 1981a(b)(3);
>
> 9) The court erred in admitting evidence of David Robinson's communications with plaintiff despite's defendant's motion in limine to exclude same under Federal Rule of Evidence 408 which precludes evidence of settlement negotiations;

Of the reasons set forth, the first seven appear to be grounds for judgment as a matter of law and the last two appear to be grounds for new trial. Rule 50 and Rule 59 set out different standards for review of the evidence. In this instance, the evidence is such that the court will not disturb the jury's verdict under either standard based on the evidence. The damages award, however, must be reduced.

Rule 50(b)—Judgment as a Matter of Law

Under Rule 50 of the Federal Rules of Civil Procedure, the court must determine whether there is sufficient evidence to support the jury's verdict and in so doing all evidentiary conflicts are to be resolved in favor of the successful party and that party is to be given the benefit of all reasonable inferences.

As stated in the seminal case *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969), in considering a motion for judgment as a matter of law, the court:

> should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is evidence that such quality and weight

> that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions, the motion should be denied . . .

*See* Branch v. Chevron Int'l Oil Co., 681 F.2d 426, 428-29 (5th Cir. 1982).

Having presided over this trial, the court firmly believes that taking all the evidence in the light and with all reasonable inferences most favorable to plaintiff Greenwell, there is sufficient evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, and thus, the motions must be denied. In addition to there being sufficient evidence to support the jury's findings, the detailed interrogatories they completed certify that due consideration was given by them with respect to the claims of sexual harassment and retaliation against both Raytheon and Leese. The court hereby incorporates and reiterates its reasons for denying defendant's judgment as a matter of law pursuant to Rule 50(a) with respect to those claims.

The award of punitive damages against Raytheon sounded in sufficient evidence to overcome a Rule 50(b) motion. While the punitive damages award must be reduced under law, the court finds that the award of punitive damages is supported by the evidence. The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides that punitive damages may be awarded against an employer proven to have, "engaged in discriminatory practice or discriminatory practices with malice or reckless disregard to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Defendant Raytheon does not content that this is a mixed motive case. This is correct. Rather, Raytheon asserts that the jury instructions "expressly instruct the jury on a mixed motive analysis," without referring the court to the instruction it has in mind. In a mixed motive case the jury would have

been instructed that a defendant may not be held liable when, even if it had not taken gender into account, it would have made the same employment decision regarding the aggrieved employee. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989). No such instruction was given to the jury in this case. Defendant also contends that plaintiff failed to carry her burden of proving that defendant's motives were in fact pretextual. The court has already stated that the evidence sufficiently supported the jury's findings with respect to both retaliation and sex harassment.

Defendant next claims that plaintiff failed to prove that Raytheon acted with malice or reckless disregard to plaintiff's federal rights. As stated above, the jury had evidence upon which it could reject defendant's legitimate, non-discriminatory reason for transferring and demoting plaintiff. That same evidence could be grounds for finding that Raytheon acted with malice or reckless indifference with respect to plaintiff's federal rights in its decision to transfer and demote her, despite its proffered reasons. Based on the evidence adduced at trial, reasonable minds could differ as to whether Raytheon acted with malice or reckless indifference with respect to plaintiff's federal rights. Thus, the court denies Raytheon's Rule 50(b) motion with respect to punitive damages.

Rule 59—Motion for a New Trial

The standard provided under Rule 59 of the Federal Rules of Civil Procedure to determine whether a new trial or remittitur is required is different from that of Rule 50. The rule does not specify what grounds are necessary to support such a decision; however, case law demonstrates that a new trial may be granted of the district court finds that verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its

course. *Smith v. Transworld Drilling*, 773 F.2d 610, 613 (5th Cir. 1985). In making its determination, the lodestar is whether the verdict is against the great weight of the evidence or would result in a miscarriage of justice. Unlike a Rule 50 motion, there is no need to view the evidence in the light most favorable to the nonmoving party. Wright & Miller § 2806.

As discussed above, plaintiff's sex harassment, retaliation, and punitive damages claims were well supported by the evidence. Thus, the jury's verdict and its answers to the jury interrogatories were not against the great weight of the evidence and clearly withstand this Rule 59 motion.

The damages awarded plaintiff were excessive based on applicable law. The court agrees that remittitur is appropriate. The court entered a judgment against defendant in the amount of $607,250.00. Of that amount, $7,250.00 was awarded in backpay, $100,000.00 was awarded in compensatory damages, $500,000.00 was awarded in punitive damages against Raytheon. Punitive damages were awarded under Title VII alone, since no punitive damages were available to plaintiff under state law; compensatory damages were awarded for both state and federal law violations by Raytheon and Wayne Leese. Further, Leese could only have been liable for compensatory damages under state law, for which there is no cap on the amount of recovery. Section 1981a(b)(3) caps awards of compensatory and punitive damages in Title VII suits at $300,000.00 Since the $100,000.00 compensatory damages award could have been based on state law violations alone, that portion of the award is not subject to the damages cap imposed by section 1981a. Only the punitive damages award of $500,000.00 against Raytheon for Title VII violations is subject to the statutory cap imposed by section 1981a. Applying the cap, the punitive damages award against Raytheon should be reduced from $500,000.00 to $300,000.00. Finding no

reason to disturb the other awards of damages and back-pay, this leaves plaintiff with an award totalling $407,-250.00.

Finally, the court rejects defendant's argument that plaintiff's testimony regarding her communications with Dave Robinson should have been excluded on the basis of Federal Rule of Evidence 408, which precludes the admission of compromise negotiations to prove liability. The claim against Dave Robinson was dismissed on the basis of a Rule 50(a) motion at trial. Rule 408 does not operate to exclude this testimony. In rejecting defendants' argument this time, the court hereby reiterates its reason for refusing to exclude to testimony as set forth in its August 25, 1996 Minute Entry.

Rule 60(b)—Motion for Relief from Judgment

Defendants next seek relief from judgment based on res judicata. The bases for granting relief from final judgment under Rule 60(b) are not applicable in this instance.[2] Defendant contends that it is entitled to relief from judgment based on the res judicata effect of a state court judgment which dismissed with prejudice plaintiff's

---

[2] Rule 60 provides the following bases for relief from final judgment: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence, (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; (6) "any other reason justifying relief from the operation of the judgment." The only possible basis for relief based on a failure to raise a res judicata defense would be under Rule 60(b)(6), since the other enumerated bases are clearly inapplicable. Relief under Rule 60(b)(6), however, should be granted only if extraordinary circumstances are present. *Picco v. Global, Marine Drilling Company*, 900 F.2d 846, 850 (5th Cir. 1990). Failure to raise res judicata defense or learn of a related prior proceeding are in this instance accredited to neglect of counsel which neglect is neither excusable nor otherwise extraordinary as to justify relief from judgment under the rule. *General Plumbing & Heating, Inc. v. American Filter Company, Inc.*, 696 F.2d 375, 379 (5th Cir. 1983).

sex discrimination case against the Louisiana Army National Guard ("LAANG").

Res judicata is an affirmative defense which must be affirmatively pled by defendant under Rule 8(c) of the Federal Rules of Civil Procedure. *Russell v. Sun America Securities, Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992). Thus, defendant had the burden to plead res judicata and plaintiff had no concurrent obligation to inform the court or defendant of the state court judgment. A federal court applies state law in determining the res judicata effect of a state court judgment. *Hernandez v. City of Lafayette*, 699 F.2d 734, 736 (5th Cir. 1983). Under Louisiana law, identity of parties is a required element of the doctrine of res judicata. *See* La. Stat. Rev. 12:4231; *Morris v. Haas*, 93-75 (La. App. 5th Cir. 5/30/95), 659 So.2d 804. Raytheon and LAANG are not identical parties. The state dismissal with prejudice of claims against LAANG or its personnel does not impact a the judgment against Raytheon, Greenwell's employer, under Title VII for Raytheon's discriminatory practices, even if there is some overlap between the persons involved. In sum, defendant's cry of res judicata is too late, not a sound basis for Rule 60(b) relief from this judgment, and lacks merit under Louisiana law.

Based on the foregoing, the court grants a remittitur and no other post-trial relief. Accordingly,

IT IS ORDERED that Defendants' Motion for Judgment as a Matter of Law, or Alternatively, for New Trial is GRANTED IN PART with respect to the request for remittitur and the judgment against defendant's is hereby REDUCED to $407,250.000; and DENIED with respect to all other asserted grounds.

IT IS FURTHER ORDERED that Defendants' Motion for Relief from Judgment is DENIED.

/s/ Stanwood R. Duval, Jr.

[Filed Dec. 6, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

---

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

JUDGMENT

This action came on for trial with a jury before the Honorable Stanwood R. Duval, Jr. presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of one hundred thousand dollars and no cents ($100,000.00), with legal interest from date of judicial demand calculated at the rate provided by federal law and defendants shall bear the costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of $7,520.00 with legal interest from date of judicial demand calculated at the rate provided by federal law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendant, Raytheon Aerospace Company, in the amount of five hundred thousand dollars and no cents ($500,000.00), with legal interest from date of entry of judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Dave Robinson, and against plaintiff, Kimberly Ann Greenwell, dismissing all claims against him;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, for all reasonable attorneys' fees. The amount of attorneys' fees is hereby referred to Magistrate Judge Lemelle for a Report and Recommendation and a hearing, if necessary, upon proper motion.

New Orleans, Louisiana this 5th day of September, 1996.

/s/ Stanwood R. Duval, Jr.
STANWOD R. DUVAL, JR.
United States District Judge

[Filed Dec. 9, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

---

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

---

# AMENDED JUDGMENT

The court having granted a remittitur in this matter pursuant to its December 5, 1996 Minute Entry and reduced the award against defendant Raytheon, the judgment is amended, as underlined below, to reflect same.

This action came on for jury trial before the Honorable Stanwood R. Duval, Jr. presiding, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of one hundred thousand dollars and no cents ($100,000.00), with legal interest from date of judicial demand calculated at the rate provided by federal law and defendants shall bear the costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Ray-

theon Aerospace Company and Wayne Leese, in the amount of $7,520.00 with legal interest from date of judicial demand calculated at the rate provided by federal law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendant, Raytheon Aerospace Company, in the amount of *three hundred thousand dollars and no cents ($300,000.00)*, with legal interest from date of entry of judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Dave Robinson, and against plaintiff, Kimberly Ann Greenwell, dismissing all claims against him;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, for all reasonable attorneys' fees. The amount of attorneys' fees is hereby referred to Magistrate Judge Lemelle for a Report and Recommendation and a hearing, if necessary, upon proper motion.

New Orleans, Louisiana this 9th day of December, 1996.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
United States District Judge

BEECH AEROSPACE SERVICES, INC.
INTER-OFFICE COMMUNICATION

From: Wayne Leese Date: 5 May 1994

To: Kimberly Greenwell

Subject: Sexual harassment investigation

*Results*

You stated that the loud tone of voice used towards you by Mr. Babin should not be considered sexual harassment. The offensive statement by another National Guardsman which occurred about eighteen months ago was sexual harassment.

*Action taken*

The complaint of harassment was passed on to LTC Nuss and CWY Babin during separate meetings on 4 and 5 May 1994. LTC Nuss stated that sexual harassment is not condoned at this National Guard site. He requested that an individual that has been harassed in any way should report the nature of the harassment to him as soon as possible.

Mr. Babin stated that any statement, action, or tone of voice that is considered offensive in any way should be reported to him also. That the person responsible for the sexual harassment statement was counseled and warned not to make statements of this nature.

Note: Any action or statement that you consider to be sexual harassment or offensive in any way should be reported to your supervisor or base management personnel in accordance with base policy and procedure 070-91 as soon as possible.

/s/ Wayne Leese

/s/ Kimberly A. Greenwell

[DoD Logo]

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 70146-0030

15 July 1994

Beech Aerospace Inc.
Madison, MS

Recent events have caused me increased concern regarding the maintenance of the C-12 assigned to Louisiana.

Specific details of events occurring in the maintenance of BP32 (tail #80-23784) relating to electrical, avionics and air conditioning work, although troublesome, do not concern me as much as the relationships and attitudes which have developed in the workforce assigned to the New Orleans bed-down site.

Situations both witnessed by me and reported to me, have occurred at this location which seem to me to be quite atypical, somewhat negative and degenerative in nature. To be specific, the following key points appear to be true and are adversely affecting the quality of service available to maintain the Louisiana C-12.

a. For reasons unknown to me there seems to be a poor relationship between Ms. Kim Greenwell and Mr. James Stout. It is characterized by poor communication by both parties and a lack of teamwork to some extent. My opinion is that Mr. Stout probably has more ability and experience than Ms. Greenwell, but is not effectively utilized. This may be due to her lack of experience or to interpersonal difficulties.

b. The relationship issue is also a problem with CW3 Michael Boudreaux, Aircraft Systems Foreman for AASF #1, (alternate COR) and Ms. Greenwell. I have taken steps to replace CW3 Boudreaux with CPT Barry Keeling C-12 pilot (full time) as the alternate COR to relieve the tensions and provide a fresh start to what has proved to be a difficult beginning.

c. Poor communication, questionable teamwork and resulting lack of confidence have displaced the quality working environment which is essential to excellent service in quality organizations.

d. After some history of this behavior, I have now become concerned that the atmosphere conducive to professional, competent support has eroded to a degree which would permit ineffective maintenance actions to become commonplace and could possibly compromise safety.

4. In conclusion, I would like to request that an appropriate adjustment be made within the BASI workforce which would relieve the current situation. As the State Aviation Officer, I am committed to working through tough times for the mutual benefit of Beech Aerospace and the National Guard. I will cooperate fully with your recommendations and am willing and anxious to communicate directly with BASI personnel regarding the issues discussed herein.

FOR THE ADJUTANT GENERAL:

/s/ Philip W. Nuss
PHILIP W. NUSS
LTC, GS, LAARNG
State Army Aviation Officer

[DoD Logo]

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 70146-0330

15 July 1994

To Whom This May Concern:

When Kim Greenwell first began working at this facility with the Louisiana Army National Guard, she was very demanding about things concerning the BASI office work area, a BASI parking spot, and equipment that we were to provide to her. Every time she needed something from us she always made sure she informed us that we had to do this because it was stated in the contract. Since BASI contract maintenance wall all new to this facility we were really not sure what the BASI contract stated that the facility had to provide to her and BASI.

Since Kim arrived at this facility she has had somewhat of a negaive attitude towards most of the people at this facility.

After working with Kim as the alternate COR for about six months, I was told by the other BASI maintenance technicial at this facility that she didn't want me in the BASI office, but as the alternate COR, I was the person responsible to maintain an accurate DA Form 1352 report for the C-12. So I had to go to her office to get flight times, and up and down maintenance times.

Kim Greenwell thinks that she doesn't have to operate by this facility's policies and procedures when it comes to good housekeeping and flight line operations. She thinks she can do whatever she wants and do it Kim's way.

I really feel if it were anybody else other than Kim Greenwell that this facility wouldn't have the problems we have with BASI. As far as the other BASI Maintenance Technician at this facility, we have no problems at all with this person. He always has a positive and professional attitude, and always request support from this facility rather than demand things be done. His overall performance far exceeds that of Kim Greenwell.

In closing I really feel that if Kim Greenwell was removed from this facility that the problems we have with BASI would be solved.

I've always been more than willing to help or assist BASI with anything I could, but for the most part Kim hardly ever accepted our help with anything. Within the past couple of weeks when the C-12's air conditioner was down for maintenance, I offered to make a line for her, but she insisted that she order the line from Beech.

If I can be of any assistance to BASI concerning Kim Greenwell, feel free to contact the undersigned at 504-243-7630 between 0630 and 1600 hours, Monday-Friday.

Sincerely,

/s/ Michael A. Boudreaux
MICHAEL A. BOUDREAUX
CW3, LAARNG
Allied Systems Foreman

DEPARTMENT OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
C-12 Detachment
Building 101, Lakefront Airport
New Orleans, LA 70126-1491

18 July 1994

BEECH AEROSPACE, INC.
MADISON, MS

Due to recent events we feel it has become necessary to inform BASI of our concerns as to the quality of maintenence being performed at base 551 in New Orleans, LA on BP32.

Starting with the most recent event we will discuss several problems that are causing concerns:

a. Our air conditioner has been inoperative for the past seven weeks. The initial part replaced was the hot bypass line, which did not repair the system. Next the evaporator coil was determined to be leaking Freon (it should be noted that the Freon detector was discovered defective and has not been replaced). When the evaporator coil arrived, the leadperson installed it alone because the assistant mechanic was on leave. The system appeared to be working after being charged; After completing the mission that day the aircraft did not fly for two days. On the next flight the air conditioner was inoperative. A rover mechanic was replacing Ms. Greenwell while she was at a school but did not have time to trouble shoot the system before the next flight. While flying out in Austin, TX the forward vent blower failed filling the cabin with smoke and fumes. The blower was replaced by BASI in Austin at which time we requested that the air conditioner be checked and repair if possible. At this time the quality of maintenance became apparent! The evaporator coil that had been replaced two days earlier had two fittings

with crossed threads. In addition a line that attaches to the evaporator was deformed at the attaching point, the expansion valve was cross threaded, all the fittings were covered in pro seal and the evaporator was not installed properly in its bracket which allowed it to vibrate and move around.

b. Fuel has been leaking through wing panels and running down the landing gear we were told this was a normal situation and the DA 2408-13's were signed off repeatedly. Finally a flame arrester was replaced, but we are still not convinced that this situation is corrected.

c. Ms. Greenwell did not completely defuel an auxiliary tank before replacing a gasket around the filler cap and excessive jet fuel spilled onto the hangar floor.

d. The leadperson was caught smoking in a non-smoking area by a recent ARMS inspection team, safety officer, and then was caught again after being counseled.

e. After a brake failure it was determined that a brake line needed to be replaced and Ms. Greenwell ordered a bleed air line instead of the hydraulic brake line. In addition she did not know how to get the tire rims apart to replace the brake line.

f. While on preflight both fuel boost pumps failed to operate after work was performed on the fuel gages, the leadperson was unable to determine the cause. To prevent a mission cancellation, a facility fixed wing mechanic was used to read the wiring diagram. He pointed out that it was the inertial switches located in the overhead panel that were tripped.

g. Ms. Greenwell as a leadperson needs to improve her attention to detail and attitude for mission requirements. Several examples of this are as follows:

1. She repeatedly refuels the aircraft within 15 minutes of departure time.

2. Leaves the chocks on the ramp after the aircraft's departure where helicopters hover.

3. Installs the carpets loose after inspections or maintenance creating hazards to crew and passengers.

4. Does not display fuel samples and acts put out if they are requested to be seen.

5. We have had a forward cowling improperly attached, come loose at 25000'.

6. In one case The Adjutant General showed up about 20 minutes early she made the statement "Its not my fault he showed up early" when the aircraft was not ready in his presence.

It is apparent that normal maintenance procedures are not being adhered to and quality control is lacking. In addition to the stated maintenance problems there is a poor work relationship between Ms. Greenwell and Mr. Stout. It is well known throughout the hanger that there has been and continues to be friction between these two individuals. This was evident in a recent comment made to the COR by the leadperson that while in her absence she preferred to have the rover do the paper work instead of the assistant mechanic. This relationship is disruptive and is not conductive to quality maintenance.

When this aircraft was assigned to the state we did not have a qualified BASI team to accept it, so it was accepted by a rover. The leadperson was attending C-12 school and the assistant mechanic had not been assigned at that time. We felt in time, Ms. Greenwell could possibly develop into a good C-12 mechanic. However, we also feel that the leadperson needs to work as an assistant to a highly qualified C-12 mechanic to achieve this. Her leadership abilities also need developing.

In light of the apparent substandard maintenance and poor working relationship with her assistant we have lost

confidence in Ms. Greenwell's mechanical and leadership abilities. We strongly feel that there is a need for change.

/s/ Norris P. Babin
NORRIS P. BABIN
CW4, AV, LAARNG
COR

/s/ Barry D. Keeling
BARRY D. KEELING
CPT, OV, LAARNG
ASST COR

[DoD Logo]

DEPARTMENT OF THE ARMY AND
THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 76146-0330

19 July 1994

To BASI

Since Ms. Kim Greenwell has arrived at this facility there has existed a definite schism between her and the personnel who work primarily in the hangar area. Her attitude caused dissension between the C-12 pilots and the technicians.

Her attitude has been one of telling, rather than requesting parts, tools or help. I personally can attest to the fact that all of my mechanics and supervisors have gone out of their way to attempt to appease her. This was for naught.

Some specific examples of her attitude towards this facility and total disregard for any type of authority can be seen in the only discrepancy this facility received during a January 1994, Aviation Resource Management Survey (ARMS). Her shop was written up as unsafe because she was smoking during the inspection. The inspector verified that she had received notification on at least two occasions through memorandum that smoking was only allowed in one area outside of the hangar. It was the inspector's impression that she knew the regulation but cvould care less about following the rules. When questioned on her use of NEK cleaning solvent, she took a defensive attitude instead of a helpful one. She threatened work stoppage and that this facility would have to pay for any other solvent that we make her use. This was only brought up because the facility safety officer received complaints from mechanics of headaches from the fumes.

She also refused on four occasions to remove tape placed on the hangar floor that BASI personnel had placed to park the C-12 in the same place. She was asked by the facility maintenance officer to remove the tape on four occasions and then claimed if she was made to do this then she would put in a claim to BASI to charge this facility. I told the C-12 COR to get the tape up and if we had to pay for it, do it. She then managed to get the tape up.

Ms Greenwell does not fit into the type attitude that all my employees show, that is, a helpful and generally happy one. She has shunned all help and any display of friendship or camaraderie that was shown towards her or her job. She is not the type of individual I enjoy having work at my facility. My recommendation is that she be reassigned to some other facility or where ever you feel she would fit in best.

Sincerely,

/s/ Thomas J. Mix
THOMAS J. MIX
MAJ, LAARNG
Facility Commander

## WHAT IS SEXUAL HARASSMENT?

■ Courts just beginning to sort out what constitutes sexual harassment

By Erin Kelly
Gannett News Service

WASHINGTON—Seven years ago, Anita Hill and Clarence Thomas brought sexual harassment into America's living rooms and started a raging debate over how women are treated at work.

Now, as Paula Jones' harassment suit against President Clinton heads toward a possible spring trial, arguments are once again heating up at dinner tables and lunch rooms.

Among the causes of indigestion: Has a woman been harassed if her boss propositions her but doesn't try to hurt her when she rejects him? Should employers ban all office romances to protect themselves from lawsuits? If men tell dirty jokes in the work place, are they guilty of sexually harassing their female co-workers?

So far, the only thing Americans seem to be sure of is that they are confused.

Sexual harassment has become a part of most people's vocabulary, but they are often fuzzy about exactly what it is.

"The problem is that sexual harassment hasn't been clearly defined," said Ron Riggio, a work-place expert at Claremont McKenna College in California. "It isn't a black-and-white kind of situation. Nobody really knows definitively whether a certain incident is or isn't sexual harassment."

Employers have added to the confusion by issuing vague harassment policies designed more to protect themselves from lawsuits than to enlighten employees, said Nancy

Hauserman, a professor at the University of Iowa's College of Business.

"I have a nagging feeling that sexual harassment is not a priority for most businesses," she said. "And there are people who gain from that confusion. Some men will throw up their hands and say, 'We can't even tell a joke or give a compliment anymore,' even though that's not what the courts are saying. It somehow diminishes the whole concept of sexual harassment by keeping it unclear."

The type of sexual harassment most people understand best is what's known as quid pro quo: the classic case of a woman's boss demanding she have sex with him if she wants to keep her job, get a raise or win promotion.

But even such clear-cut cases have been causing legal controversy, and the Supreme Court now is stepping in to help sort it out.

Justices this year are hearing four cases, most notably whether Kimberly Ellerth, a former marketing representative for Burlington Industries, can be awarded monetary damages although her boss did not carry out alleged threats to hurt her career when she rejected his sexual advances.

Lower courts have split on the issue, with some ruling that you haven't really been harassed unless you've suffered financially.

President Clinton's attorneys are using a similar argument, saying that even if Paula Jones' allegations that he denies are true, she was not punished at work. In fact, they say, she received raises of 25 percent over two years in her job as a clerk in Arkansas government.

Jones' attorneys argue that sexual harassment violates a woman's civil rights' protections against discrimination —even if there is not retribution.

The latest sexual accusations against the president—of an affair with former White House intern Monica Lewinsky—would not qualify as harassment under federal law because it was a consensual relationship. But some feminists, including a Northern Virginia chapter of the National Organization of Women, have argued that a sexual relationship between a boss and an employee is an abuse of power and therefore a form of harassment.

Most would disagree, Riggio said.

"For a sexual advance to be harassment, it has to be unwelcome," he said. "But I do think people who are in positions of power need to be very careful about their relationships. You can't deny your position or your power, and the effect it can have on your employees."

As a result, many companies have policies against it.

---

The Paula Jones case

Even if Paula Jones' sexual harassment allegations against President Clinton are true, Clinton's attorneys say it would not constitute harassment because she was not punished in any way and, in fact, later received 25 percent pay raises.

Jones' attorneys argue sexual harassment violates a woman's civil rights, even if there is no retribution.

---

The law is even murkier when sexual harassment by a woman's co-workers creates a "hostile work environment" that prevents her from doing her job.

There have been numerous cases in which female employees have charged that male co-workers targeted them

for sexual harassment, often as a way to make it clear that women are not welcome in traditionally male jobs.

Case in point: A jury in the fall awarded damages to Tammy Blakey, the first female captain of Continental Airlines' A300 Airbus, who complained that pornographic photographs repeatedly strewn by male employees throughout the cockpits of the planes she piloted created a hostile environment.

But serious cases have been overshadowed recently by highly publicized incidents of schools and businesses adopting policies many folks may think absurd.

Just this year, in Fullerton, Calif., a junior high principal temporarily banded hugging between students because public displays of affection could create a "hostile environment" that might make some people uncomfortable.

Then there was the summer's notorious *Seinfeld* case, in which a jury awarded $26 million to a man fired by Miller Brewing Co. for telling a female co-worker about a sitcom episode that revolved around a woman whose name rhymed with a female body part.

The verdict was seen by some court observers as a backlash against the increasing number of harassment complaints, which have more than doubled in the last seven years—from 6,127 in 1991 to 15,889 in 1997, according to the Equal Employment Opportunity Commission.

Feminist law professor Vicki Schultz of Yale University fears the backlash will grow if courts and corporations continue to elevate sexual interactions above broader forms of gender discrimination in the work place.

"The focus on sexuality has led some companies to engage in what I call over-reaching," Schultz said. "If

someone just talks about sex, that's seen as a problem. I don't want to see men or women fired in the name of sexual harassment law because they tell a sexually explicit joke in the work place, I think it gives feminism a bad name."

In a *Yale Law Journal* article to be published in April, Schulz advocates a return to the original intent of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against employees because of their sex in hiring, firing, wages, benefits or working conditions.

Sexually explicit harassment is just one form of discrimination in the work place, but courts have repeatedly ruled it is the only one that women can cite to sue their employers for creating a hostile environment, Schultz said.

As a result, she said, women who have been subjected to horrendous harassment at work have lost court cases because the abuse was not sexual.

Schultz cites a case in which Margaret Reynolds, a journeyman electrician, charged that she had been subjected to a constant barrage of harassment by male coworkers after being named sub-foreman of a construction job at Atlantic City's convention center. She said her male subordinates refused to work for her, directed obscene gestures and verbal abuse at her, and stood around laughing while she unloaded heavy boxes.

Reynolds and another female electrician were replaced by male workers when an exhibitor at the convention center demanded that female workers be removed from the floor during the Miss American pageant. Apparently, the exhibitor didn't like the contrast between female electricians and beauty contestants.

When the pageant was over, the convention center's director fired the whole crew and hired nearly everyone back the next day, with the exception of Reynolds and a few others. A man became the new sub-foreman.

When Reynolds sued, a federal court rejected her claim, saying she was not subjected to a hostile work environment because the harassment was not sexual.

"Women have had great success in making the case in court that unwelcome sexual advances are a form of discrimination," Schultz said. "But what the courts don't get is that there are equally harmful forms of abuse that are not sexual but are based on the fact that the employee is a woman."

While Schultz is hopeful the courts may redirect their focus, many companies continue to fret more about the sex lives of their employees than about whether men and women are given equal opportunities to succeed.

Even before news of the alleged Clinton-Lewinsky relationship broke, attorneys at Littler Mendelson of San Francisco were being asked by clients to draw up agreements shielding employers from lawsuits when office romances turn sour.

Employees who date one another are asked to sign statements saying the relationships are consensual and that they are aware of the company's sexual harassment policies, said Scott Wenner, a partner in the law firm.

The Clinton-Lewinsky flap will only increase the demand for these "relationship agreements," Wenner predicted.

Meanwhile, working women continue to face more basic problems.

"My (female) students tell me they are not getting the same types of entry-level jobs as men because employers believe they're just going to get married and have kids," said Martha Ackmann, professor of women's studies at Mt. Holyoke College in Massachusetts. "You'd think we'd be long past that now. But we're not."

SPECIAL REPORT

# LAWS THAT RUN AMUCK

Two ill-conceived laws are to blame for the current crisis in American politics

By JEFFREY ROSEN WASHINGTON

AS AMERICA STRUGGLES TO UNDERstand the Lewinsky affair, there's a natural temptation to make sense of the drama by reducing it to a clash between individual heroes and villains. And so we have a parade of soap-opera caricatures—the overzealous and partisan prosecutor, the lusty young temptress, the bloodless wife, the philandering husband—all competing for blame in the public eye.

But the real villains in the current crisis are bad laws, rather than bad women or bad men. In particular, the explosive collision of sexual-harassment doctrine and the Independent Counsel Act, combined with the erosion of legal protections for privacy, has led to violent breaches of the boundaries between public and private life. At each stage in the endless legal battles, judges, prosecuotrs and lawyers have made decisions that, while technically defensible, have had brutal consequences for the parties, their innocent friends and, ultimately, the country.

Let's begin with sexual harassment. Last May, when the Supreme Court rejected President Clinton's claim that Paula Jones' sexual-harassment suit should be delayed until he left office, the Justices unanimously dismissed the President's claim that allowing the suit to proceed would generate unrelated litigation that might hamper his ability to do his job. The events of last week suggest that the court's optimism was misplaced.

Much of the problem stems from the elastic nature of sexual harassment itself, which is defined so expansively (it includes "unwanted advances" that create an "offensive working environment") that no one is quite sure what it

means. After the court ordered the Jones case to proceed, President Clinton's lawyers made a plausible argument that her suit should be dismissed without a trial. Even assuming, for the sake of argument, that her allegations were true, the President's lawyers said they didn't add up to illegal harassment.

To win her case before a jury, Jones would have to prove that Clinton had conspired, in his official capacity as Governor, to deprive Jones of her constitutional rights. But it's hard to see how making a pass at someone and taking no for an answer violates the Constitution. (Jones' claims that Clinton retaliated against her for resisting his advances are far less convincing.) Nevertheless, the law required Judge Susan Webber Wright to give Jones every benefit of the doubt at the beginning of a case, and so she allowed Jones' lawyers to begin "discovery."

That's where the trouble started. Sexual-harassment suits have a tendency to spiral out of control because the relaxed rules of civil discovery permit lawyers for the plaintiff to rummage freely through the defendant's sexual history, to try to prove a pattern of "unwanted advances." In criminal trials involving serious sexual allegations, such as rape, inquiries into the sexual history of the alleged victim and the defendant are more carefully limited.

What followed was a gross invasion of privacy. During a three-year search, Jones' lawyers sent private investigators to comb the country, using the rough force of subpoena power to compel women who were rumored to have had consensual affairs with the President to discuss their sex lives against their will. At least five women denied the rumors in pretrial depositions, one of whom was Monica Lewinsky. But merely by asking these intrusive questions, Jones' lawyers were able to force Lewinsky, as well as the President, to discuss their private lives under oath.

Enter Kenneth Starr. The independent counsel had been given tapes of Lewinsky that suggested that she and

the President might not have told the whole truth about their relationship. In an ordinary civil suit, evidence that a witness lied in a deposition might, at worst, be used to embarrass her at trial, and ultimately the jury would decide whom to believe.

But *Jones v. Clinton* wasn't an ordinary civil suit because it was being shadowed by the independent counsel. Confronted with the secret tapes, Starr was technically within his authority to ask Attorney General Janet Reno to recommend an expansion of his jurisdiction. Like sexual-harassment litigation, the Independent Counsel Act is so elastic that it authorizes the investigation of "other allegations . . . arising out of" the original Whitewater assignment. And if Clinton had asked his friend Vernon Jordan to get Lewinsky a job at Revlon to buy her silence in the Jones inquiry, Starr could plausibly wonder whether this made it more likely that Clinton had also asked Jordan to get a job at Revlon for Webster Hubbell, the former Associate Attorney General, to buy his silence in the Whitewater inquiry.

Although plausible, the theory was so elaborate that Starr's efforts to prove it soon began to unravel. On Jan. 29, Judge Wright in Arkansas ruled that "evidence concerning Monica Lewinsky should be excluded" from the Jones trial, on the grounds that it was more likely to confuse a jury that cast any light on Jones' claims. Better late than never.

As a result of Judge Wright's ruling, Starr's efforts to make a case that Clinton committed perjury have become much more complicated. Most prosecutors would hesitate to bring perjury charges when the alleged lies aren't material to the case—in other words, when there's little chance they would influence the outcome of the case. Even Starr's friends acknowledge that Judge Wright's ruling makes it far less likely that Starr will ever bring perjury charges against Clinton or Lewinsky, which also reduces his leverage in securing Lewinsky's cooperation.

Where does that leave the independent counsel? He still plans to investigate whether the President obstructed justice by encouraging Lewinsky to lie in her deposition. But without Lewinsky's help, Starr isn't much closer to proving that charge than he was before the ugly drama began. Even if Starr does uncover evidence that Clinton encouraged Lewinsky to lie, he's unlikely to prosecute because most legal scholars believe the President can't be indicted before he is impeached. Because of the odd incentives created by the Independent Counsel Act, which allows Starr to justify his existence by pinning a crime, any crime, on his target, the investigation will continue to lurch from one allegation to the next, with its ending always just out of reach.

If anything good comes out of this dark episode in American politics, it will be a reexamination of the ill-conceived laws that made it possible. Perhaps Democrats and Republicans, in an act of mutual disarmament, will finally let the law expire when it comes up for a reauthorization vote next year. And perhaps the Supreme Court will seize the opportunity presented in several cases this year to refine the definition of harassment in ways that recall its core meaning of sex discrimination in the workplace. Finally, Congress could acknowledge that the Supreme Court was too optimistic in the *Clinton v. Jones* case, and give future Presidents temporary immunity from civil-law suits while in office.

Ultimately, of course, the President must take responsibility for his own behavior. But as long as these illiberal laws remain in force, we will continue to suffer from the criminalization of sex and the criminalization of politics, regardless of who lives in the White House. ■

*Time*, March 23, 1998

CLINTON'S CRISIS

SEXUAL HARASSMENT CAN MEAN FIRING VICTIMS WHO DON'T GIVE IN OR MERELY TELLING A DIRTY JOKE. CLINTON'S FATE RESTS ON LAWS THAT TIE EVEN LAWYERS INTO KNOTS

## SEX AND THE LAW

By JOHN CLOUD

Bill Clinton should be happy that Paul Jones' sexual-harassment lawsuit against him won't be decided by the city attorney of little Murfreesboro, Tenn. It was there in 1995 that local artist Maxine Henderson exhibited some of her work in the city hall rotunda, including *Gwen*, a painting of a partly nude woman. A city employee saw the painting and was offended—so much so that she filed a sexual-harassment complaint against her employer. City attorney Tom Reed promptly whisked the painting away. Although a judge eventually ruled that Henderson had a First Amendment right to hang her art in the rotunda (it's a public place, after all), the lawsuit frightened Reed. To this day, he won't allow *Gwen* to be displayed in city offices that aren't public places. "In my opinion, that would count as sexual harassment," he says.

In today's overheated legal environment, if an impressionistic painting more modest than many at Matisse can, on its own, count as sexual harassment, the President could be doomed. Jones maintains that as Governor of Arkansas, Clinton exposed himself to her and asked for oral sex at a Little Rock hotel. There was nothing impressionistic about it, Jones said in her deposition last fall: "I mean, it was disgusting."

Her account is a matter of great dispute, one likely to land the President's case in an Arkansas courtroom in

May. But in truth the tangle of laws currently defining sexual harassment is so jumbled that even if everyone could agree on the facts, it's simply impossible to predict the outcome of a case like *Jones v. Clinton*. Just 25 years ago, sexual harassment was considered a radical-fringe by-product of feminist theory. Today it's embedded in multiple Supreme Court decisions (three more are expected before July), thousands of corporate policies and a host of lower-court cases that have spread like kudzu across the legal landscape. The result is a thicket of rulings. Since 1991, juries have returned well over 500 verdicts on sexual harassment—decisions that often contradict one another and send mixed signals about how we should behave anytime we meet a co-worker we'd like to see after five.

Because of the twin trends of long hours (10% more than we worked in 1969) and more women working (18 million more today than in 1980, or about 50% of the labor force), more Americans than ever are flirting, dating and propositioning at work. Actually, only a tiny proportion of office come-ons result in harassment complaints; of those that do, just 9% end up in formal proceedings, whereas 38% of relationships that start on the job survive into the long term. The huge surge in sexual-harassment cases that took place in the early '90s has slowed. Such cases are still being filed at the rate of 15,500 a year—some 60 new cases every working day—compared with 6,900 in 1991, but the number hasn't changed much for three years. A recent survey of human-resources managers found that 7 out of 10 handled at least one sexual-harassment complaint last year, down from 9 out of 10 in 1995.

Meantime, employers fearing lawsuits are stopping harassment before it starts. Some, like General Motors and Wal-Mart, have instituted zero-tolerance policies banning just about any speech or conduct with sexual undertones, like sending E-mail with a naughty Web address to a

co-worker, which not so long ago would have been deemed not just harmless but constitutionally protected. While it's rare for nonthreatening behavior to be ruled harassment, it happens. In 1993 the University of Nebraska forced a grad student to remove from his desk a picture of his bikini-clad wife after two fellow students complained that the photo violated the school's sexual-harassment policy.

The legal principle of harassment hinges on impossibly squishy terms like "unwelcome" and "pervasive," words that a thousand lawyers can define in a thousand ways. As a consequence, some despicable harassers get off easy, just as some men (and, increasingly, women) with innocent intentions can have their lives ruined. That's because intent seldom defines harassment; reception and perception do.

The confusion and excessive rulemaking may already be sowing the seeds of backlash. In a recent TIME/CNN poll, just 26% of those surveyed called sexual harassment of women "a big problem," down from 37% in 1991. What's more, 57% of men—and 52% of women—agree that "we have gone too far in making common interactions between employees into cases of sexual harassment."

In short, many think the solution has become as bad as the problem. "In 1964 [when discrimination based on gender first became legal]," says UCLA harassment-law expert Eugene Volokh, "if you told a member of Congress, 'If you vote to bar discrimination based on sex, you will prohibit employees from putting pictures of their wives in bikinis on their desks,' most legislators would have said, 'Wait a minute, where does it say that?' "

What exactly is the law on sexual harassment, and how did it evolve into such a beast? Legally speaking, there are two kinds of sexual harassment, and Jones—to take a not so random example—charges both. The first is called "quid pro quo" harassment, and it's the easier to grasp. If your boss docks your pay or fires you or otherwise pun-

ishes you for rebuffing an advance, he's flat-out guilty. Jones, for instance, says her supervisors at the little state office where she was a clerk mistreated her after she rejected Governor Clinton's alleged advance. Her co-workers got bigger raises, she says, and her job became a "dead end." Clinton has denied that he propositioned her (and indeed has deneid that he ever sexually harassed any woman). Further, Clinton's lawyers say there was never any "quid" for Jones' refusal to "quo"—that she received a promotion and pay hikes as the others did.

A generation ago, Jones would have had no case. Not even blatant quid pro quo harassment was illegal; many judges simply deemed such matters "personal." When they were allowed to bring lawsuits, plaintiffs—nearly all women today—had no right to jury trials, leaving their fate up to a mostly male stable of judges.

Things began to change, albeit slowly, in the '60s. In 1964 Southern members of Congress tacked "sex" onto the list of protections in the pending Civil Rights Act, not because they cared about harassment but because they thought the idea so laughable that it would kill the entire bill. It wasn't until the 1970s that courts started taking the antidiscrimination provisions on sex seriously, and not until 1977 that a federal court of any stature—the U.S. Court of Appeals for the District of Columbia—said quid pro quo harassment violated the act. After the 1991 furor between Anita Hill and Clarence Thomas raised public consciousness, George Bush signed a law granting sexual-harassment plaintiffs the right to jury trials and big-mony damages.

Even then, quid pro quo cases remained tough to prove, since employers could simply say the retribution resulted from poor job performance. Victims began to point out that co-workers could create an abusive climate against women without actually demanding sex in exchange for something. One such victim was Mechelle Vinson. In the 1970s Vinson worked as a teller at Meritor Savings Bank,

where, she later claimed, her boss began asking her for dates. At first she said no, but eventually she relented; she estimated they had sex 40 or 50 times. She claimed that she felt pressured into the relationship and that he exposed himself, groped her at work and even raped her several times. Still, he never fired or even demoted her when she objected. Vinson lost her court case.

With the support of several women's groups, however, she appealed. In 1986 the Supreme Court ruled in her favor—and in doing so threw open a huge new arena for sexual-harassment claims. In its first ruling ever on sexual harassment, the court held that speech or conduct in itself can create a "hostile environment"—like the one Vinson alleged at Meritor—and that such an environment violates the Civil Rights Act. According to the Justices, unwelcome verbal or physical behavior, if "severe or pervasive" enough, is discriminatory even when there is no quid pro quo.

Today quid pro quo cases remain hard to win, and most sexual-harassment cases are based on the looser principle of "hostile environment." At a trial last year, Staci Bonner, a former research editor suing *Spin* magazine and its publisher Bob Guccione Jr., failed to convince a jury that because Guccione gave choice assignments and other perks to women who slept with him—but not to her—he was guilty of quid pro quo harassment. But the jury did say that his apparent favoritism, as well as other editors' coarse propositions and unwanted back rubs, created a hostile environment at the music magazine. The case is being appealed.

Given the expansive terminology, just about anything can count as a hostile environment, depending on who's defining the terms. In 1995 the Montana Human Rights Commission awarded damages to Josephine Dernovich, a former municipal clerk horrified by smutty pictures her co-workers passed around. The images were stomach churning to her—some depicted bestiality and incest—but

no one else complained. None of the pictures was directed solely at her, and most of her colleagues were women. It's hard to understand how she was discriminated against because of her sex (and not, say, her attitudes about sexual pictures). Still, Dernovich won.

Paula Jones too is asserting that Clinton's alleged pass at her created a hostile environment, but she may have a hard time proving it. The judge in the case has ruled that a single incident of harassment could be enough to create a hostile environment. But most experts agree that such an incident would have to be especially outrageous. "From what I've seen, [Jones] clearly doesn't have pervasiveness—it was just one incident—so she has to prove severity," says Deborah Epstein, who teaches law at Georgetown University. "And there are lots of things worse than this incident that the courts have said are not severe enough." Epstein cites the plight of Kimberly Weinsheimer. In the mid-80s Weinsheimer was a Rockwell International Corp. employee who inspected parts used to build spacecraft at the Kennedy Space Center. In her suit, Weinsheimer said that over an eight-month period, a co-worker frequently asked that she "suck him," grabbed her crotch and breasts and once held a knife to her throat. Another colleague allegedly touched his penis to her hand when she was looking away. Even so, a federal court ruled against her, in part because the judge thought the harassment wasn't severe enough. "The comments, in both their nature and their causes, were apparently commonplace and routine," the judge wrote, as if frequently somehow diminished severity.

To avoid the same fate, Jones' lawyers now argue that Clinton was more aggressive in the hotel room than Jones said in her original 1994 complaint. In her recent deposition, Jones said that Clinton in fact tried to grab her crotch and kiss her and that he briefly blocked her way—not simply that he had lightly touched her, as Jones first said. These elements make the incident sound much more "severe," especially coming from her ultimate boss.

(Courts are tougher on accused CEOs than accused co-workers.) Clinton's attorneys, who contend that the new details are lawyer-induced embellishments, will doubtless want jurors to compare Jones' original complaint with her current story. Just one Friday she added several charges, including an expert's testimony that the alleged incident left her with symptoms that resemble post-traumatic stress disorder.

Jones' team is employing a legal strategy that most sexual-harassment plaintiffs can't afford—a search through the garbage bin of Clinton's sexual history. Specifically, her lawyers hope to present "a pattern and practice" by the President of sexually harassing other women, bolstering Jones' broader claim of sexual discrimination. (The courts have said such patterns are relevant in discrimination cases.) Jones and her lawyers figured that if they could find as yet undetonated "bimbo eruptions" in Clinton's past, they could show this damning pattern: that again and again Clinton hits on women with less power than he. It was this investigation that yielded Monica Lewinsky, not to mention Kathleen Willey and dozens of others tracked down by the Jones team. Today Willey could be Jones' best shot at showing the pattern. When she was a White House volunteer, Willey says she went to the Oval Office to ask the President for a paying job. Before she left, she says, Clinton hugged her, felt her breasts and then placed her hand on his aroused genitals. In his own deposition, Clinton denied each of these charges.

Clinton's lawyers in turn scoured Jones' sexual past, but whatever they came up with probably won't be presented in court—thanks in part to Clinton. In 1994, when he signed the Violence Against Women Act, he restricted the kinds of digging that defendants can do into the past of sexual-harassment plaintiffs—and specifically allowed such evidence against harassers who are accused of assault (the Jones team has argued in pleadings that Clinton's alleged behavior in the hotel room amounts to

assault). "Now you have to be very careful about dredging up a woman's psychological or sexual history," says Judith Vladeck, a New York City lawyer who has handled sexual-harassment cases for 20 years. Technically, the new rules don't apply to the Jones case, as she filed suit before they took effect. But the rules have created a new climate in which such evidence appears unseemly. And anyway, for political reasons a Democratic President won't want to look too aggressive in trashing his accuser.

The Jones team's search has doubtless been frustrating even as it has embarassed the White House: Lewinsky, the biggest catch, won't be part of the trial. Federal Judge Susan Webber Wright has ruled that no one can drag that scandal into her courtroom, in part to avoid interfering with special prosecutor Kenneth Starr's case. And anyway, no one claims that Clinton's alleged encounters with Lewinsky were unwelcome. Still, says Washington lawyer Douglas Huron, "if a man uses the power of his position to pursue a woman, then that could be deemed relevant." In spite of Wright's ruling, it's easy to imagine that "consent" is meaningless when offered by a starstruck intern. If Clinton were president of a FORTUNE 500 company instead of the country, he'd probably be toast. "If a CEO had sex with a 21-year-old girl in his office," says Monica Ballard, a consultant who advises businesses on sexual harassment, "I would tell the company, 'Fire him for poor judgment.'"

Employers pay people like Ballard hundreds of dollars a day for their advice. Headlines on sexual harassment scare the money out of them. Just last month the EEOC obtained its largest sexual-harassment settlement ever when drugmaker Astra U.S.A. agreed to pay nearly $10 million to scores of employees who claimed they had been fondled, asked for sex or exposed to a hostile environment by the former company president and others. Other firms have lost even more in jury verdicts favoring plaintiffs.

Companies have responded to the legal morass with wildly varying policies. Some ignore the issue, and others,

particularly those burned with lawsuits, even ban inter-office dating. Nearly 9 out of 10 companies have procedures for dealing with sexual harassment, according to a recent survey, but many of those procedures are weak—"a paragraph in the company handbook," says Ellen Bravo, co-director of the National Association of Working Women.

Experts routinely warn companies not to get caught with lax policies, which can enrage juries and inflate settlement costs. Consultants' on-site training is usually straightforward; if what you're thinking even vaguely involves sex, keep it to yourself. Ballard poses hypotheticals such as, What if someone gets the Victoria's Secret catalog at work? "If someone makes a comment about that, you get rid of it," she says. Parallax, her company based in Santa Monica, Calif., teaches that one complaint is enough to change office policy—and such advice is becoming the standard in business schools and financial newspapers. A U.S. Department of Labor brochure on sexual harassment even advises that those who hear "sexual jokes or . . . sexual things that you didn't like" could be victims. Several states offer equally broad, subjective definitions.

Employers are heeding the advice, sometimes too well. The University of New Hampshire suspended a professor of technical writing, J. Donald Silva, in 1993 for classroom remarks he had made the previous year. Besides other suggestive comments, Silva had compared the focus required for writing to that demanded by sex. He had also said, "Belly dancing is like Jell-O on a plate with a vibrator under the plate." Weird, yes. But harassment? The university thought so and directed Silva to take counseling at his own expense. Instead he filed suit. Backed by the Center for Individual Rights, a conservative Washington-based advocacy group, Silva won. A federal judge ruled that the school had trampled n his First Amendment rights. The university reinstated Silva, who is now 62 and teaching once again.

Some employers have got more than a slap on the hand. In an important case in California, a jury awarded Ralph Cotran $1.78 million in lost compensation four years ago in a wrongful-termination lawsuit against his former employer, insurance brokerage Rollins Hudig Hall International. The company fired Cotran in 1993 after two secretaries alleged sexual harassment. He denied it and claimed that he and two women had been involved in consensual relationships. "I didn't do it, but the company ignored every shred of evidence on my side," he says today.

The jury agreed with the defendant—as have other juries in a few such backlash cases. The most famous was brought by Jerold Mackenzie, a former Miller Brewing executive, who claimed that the company wrongfully interfered with his employment status after a co-worker, Patricia Best, accused him of sexual harassment. He had recounted for Best an episode of *Seinfeld* on TV that indirectly referred to the clitoris, and then showed her the word in the dictionary. A jury gave him $26.6 million last summer.

But such cases remain the exception, and few have been upheld on appeal. Part of Mackenzie's giant damage award has already been set aside by a judge. And the California Supreme Court dealt Cotran a setback in January, when it ordered a new trial, which may be harder for him to win. The court said if employers fully investigate and arrive at a "good-faith belief" that harassment occurred, they may fire the alleged harasser.

The next big legal battle on sexual harassment will probably center on free-speech concerns. UCLA's Volokh says liberal court rulings have had a "chilling effect" on free speech at work. He says many employers are scared to write anything other than zero-tolerance policies that prohibit any potentially offensive speech. "Something like 'Women don't belong here,' that's sexist, but it should be protected speech," Volokh says. Few defendants have used the First Amendment as a defense. ("Lawyers just

don't think about it," Volokh adds.) As sexual-harassment laws strike further and further into what we are allowed to say to our co-workers, look for that to change.

Of course, some contend that giving up our right to tell dirty jokes is a small price to pay to prevent harassment. Georgetown's Epstein argues, "I think that one has to balance your concern for the First Amendment with your concern for equality." Maybe. But because so many of us spend more time at work than at home, today's co-workers are the neighbors and bowling-league partners of yesteryear. It's difficult to imagine that we can't talk to them about sexual topics—not just our personal lives but Monica and Bill, the teacher and her 13-year-old student lover, or Marv Albert and his dating habits.

Before this term, the High Court had issued just two major decisions on workplace sexual harassment. This term it has four cases, one of which it decided this month: it broadened sexual harassment to include same-sex cases. The three other rulings, expected before July, won't address the First Amendment, but they should end some other disputes over the law. In two of the cases—both scheduled for oral argument this week—the court will determine to what extent employers are liable for harassment to which top management has not been explicitly alerted. In the absence of such a ruling, many companies have assumed they are liable for just about anything and adopted zero-tolerance policies for everyone from the janitor to the CEO.

In one of the two cases, the court will decide whether to hold a Texas school district responsible for the actions of teacher Frank Waldrop. According to court documents, a cop discovered Waldrop having sex with an eighth-grader, who later claimed that the couple had had sex regularly. Her mother sued the school system, even though no school-district employees (except Waldrop, of course) knew about the affair. She argued that the district was

liable anyway, on the theory that employers are responsible for an employee's bad acts if his employment status helped the employee commit them.

The other case, *Faragher v. City of Boca Raton,* involves two municipal lifeguards in the town north of Miami who claimed that they were sexually harassed by their supervisors. A judge found that they had been harassed but that the city should not be held responsible because no officials in city hall knew about the abuse.

The third case before the court, arguably the most important of this term, was brought by a marketing employee at Burlington Industries. Kimberly Ellerth says her boss's boss made constant sexual remarks to her. He allegedly rubbed her knee and told her that her legs were nice but her breasts were too little. She says he once told her, "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth interpreted this to mean that she would have to have sex with the executive, a vice president, in order to get ahead. But in fact she never slept with him—and she did get promoted. A lower court ruled that Ellerth suffered quid pro quo harassment anyway—without actual retribution. Jones' lawyers have cited this ruling prominently. Burlington appealed, and now the Justices must determine if quid pro quo harassment can include mere threats.

Even after the court rules on these matters, there's likely to be confusion about sexual harassment. The end of the old patriarchal system, in which male bosses behaved as they pleased with female subordinates, has necessarily complicated gender relations in American offices. To sort out who is misbehaving now, the law must rely on subjective notions of power and courtship, sex and sensitivity. The best company policy would allow coworkers their freedom and privacy but punish truly unwanted, harmful behavior. But no one has figured out exactly what that policy should be—least of all the law-

yers and judges who keep adding new loops and threads to the complex web of sexual-harassment law.—*With reporting by Jay Branegan and J.F.O.McAllister/Washington, Dan Cray and Margot Hornblower/Los Angeles, Pat Dawson/Billings, Rod Paul/Portsmouth and Elaine Rivera/Southampton*

Supreme Court, U.S.
FILED
APR 27 1998
CLERK

No. 97-1560

In The

# Supreme Court of the United States

October Term, 1997

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,

*Petitioners,*

v.

KIMBERLY ANN GREENWELL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT, KIMBERLY ANN GREENWELL

Submitted By:

MAUREEN BLACKBURN JENNINGS
*Counsel of Record*
1503 Tchoupitoulas Street
New Orleans, Louisiana 70130
(504) 524-1040

TRACY A. BURCH
JONES, MITCHELL & BURCH
509 Market Street, Suite 730
Shreveport, Louisiana 71101
(318) 425-0870

*Counsel for Respondent, Kimberly Ann Greenwell*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE ..... 1

A. STATEMENT OF FACTS ..... 1

B. PROCEDURAL HISTORY OF THIS CASE .... 18

SUMMARY OF ARGUMENTS FOR DENYING WRIT ..... 20

ARGUMENT ..... 20

I. Petitioners have failed to seek *certiorari* on the case that was presented to the jury for determination and reviewed by the district court and the court of appeals. Rather, petitioners have gleaned from a much broader factual presentation certain discrete propositions, which were found not credible by the trier of fact.. 20

A. The jury heard evidence of a long-standing pattern of gender discrimination and sexual harassment which far exceeded the hostile environment claims presented by petitioners in seeking *certiorari* ..... 20

B. The facts of the so-called "investigation" by petitioners were presented in full to the trier of fact, which chose to disbelieve the version of events presented by petitioners both at trial and to this Court ..... 23

C. The trier of fact heard a variety of evidence regarding petitioners' "legitimate business reason" for demoting Greenwell and chose to reject petitioners' proffered reason ..... 25

TABLE OF CONTENTS – Continued

Page

II. Petitioners have re-fashioned the exact sufficiency of the evidence arguments presented in post-trial motions into questions on standards of law. These same questions were presented to and reviewed by both the district court and the Fifth Circuit as sufficiency of the evidence arguments, and were deemed by both to be without merit ..... 26

CONCLUSION ..... 28

# TABLE OF AUTHORITIES

Page

CASES:

*Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993) ..... 23

*Nowlin v. Resolution Trust Corporation*, 33 F.3d 498 (5th Cir. 1994) ..... 25

STATUTES:

42 U.S.C. § 1981a ..... 19

42 U.S.C. § 2000e ..... 18

La. Civ. Code art. 2315 ..... 18

La. R.S. 23:1006 ..... 18

La. R.S. 51:2234 *et seq.* ..... 18

FEDERAL RULES:

Federal Rule of Civil Procedure 50(a) ..... 19

Federal Rule of Civil Procedure 50(b) ..... 19

## BRIEF IN OPPOSITION

Kimberly Ann Greenwell respectfully represents:

## STATEMENT OF THE CASE

Petitioners seek review by this Court of a *per curiam* unpublished opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the compensatory damages awarded to Kimberly Ann Greenwell (hereafter "Greenwell" or "Kim Greenwell") for gender discrimination, sexual harassment and retaliation under federal and state law. The Fifth Circuit, with one exception, affirmed the trial court's determination that there was sufficient evidence to support the jury verdict. The Fifth Circuit reversed the award of punitive damages, however, finding a lack of sufficient evidence to support this award.

With nothing more than a question of sufficient evidence before it, the Fifth Circuit's single sentence affirmation of the compensatory damage award demonstrates that there is little for this Court to review. Petitioners' request for *certiorari* should therefore be denied.

### A. STATEMENT OF FACTS

Kim Greenwell spent four years on active duty in the U.S. Navy as an aircraft mechanic. She encountered no problems getting along with her fellow sailors or superior officers and received two promotions and three awards. Following her discharge from active duty, she went to

work for Raytheon (known then as "BASI") as an aircraft mechanic.

During the more than five years that Raytheon employed Greenwell, Raytheon had a contract with the U.S. Government to maintain military aircraft at over 140 sites worldwide.[1] Both military pilots and support staff and Raytheon employees worked at these sites. The contract was described by a Raytheon official as "a turnkey operation." The military pilots "get in the airplane, they fly off, they land, and they walk away. We do everything to it."

Greenwell worked at two Raytheon sites in California for about two years and she got along well with her superiors, fellow workers and the customer at both sites. Her initial evaluation[2] by Raytheon stated:

> Kim is a good aircraft mechanic, and fast becoming a great one. She is a self-starting fast learner, who when given a job to do carries it out to the very end. When Kim is not working on aircraft, she is reading the maintenance manual about them. Kim is well liked by everyone at Base 516 and is an asset to the Moffett Field BASI team.

On her second evaluation, her supervisor commented:

---

[1] At each of these sites, Raytheon's liaison under the contract was a Leadperson and the military's liaison was the Contracting Officer Representative or "C.O.R."

[2] Greenwell received ratings of satisfactory or above average in all six categories and the best rating for Safety Habits on all five subsequent evaluations until August 1994, three months after Raytheon's customer was notified of her sexual harassment complaint.

> Kim is an outstanding young lady. Her attitude and initiative coupled with her judgment is an outstanding asset in the sometimes turbulent world of test and integration. Her job knowledge, quality and quantity of work is unsurpassed by her peers. As her experience grows so does her self confidence. She will someday be a fine BASI Leadperson.

In 1992, Greenwell was promoted to Leadperson[3] and transferred to the Lakefront Airport site in New Orleans. Her supervisor at the time of her promotion and transfer stated on her last evaluation in California that she "has done an excellent job" and predicted that as Leadperson she "should do fine with [ ] minimal problems."

Raytheon's customer at the Lakefront site, the Louisiana Army National Guard ("the Guard"), had one C-12 aircraft which was housed in the Guard's hangar, along with the Raytheon workshop and Guard offices. This was a new site under the contract and the Guard had previously maintained its own plane without an outside contractor. During Greenwell's two years at Lakefront, Raytheon had two employees at that site: Greenwell and Jim Stout, a mechanic whom she supervised. Greenwell reported to Lakefront in early August 1992. Stout did not arrive until November 1992. While at Lakefront, Greenwell reported to her Area Supervisor at the home office

---

[3] A Leadperson's duties included a mechanic's duties – to keep the aircraft serviced and flying – as well as responsibility for the bed down (the site), completing all required paperwork and logbooks, and delegating work assignments. As the senior Raytheon representative, the Leadperson had ultimate responsibility for what happened at the site.

who, for the first 18 months, was Walt House. In November 1992, the Guard's C.O.R., Norris Babin, praised Greenwell's abilities to House and told him she was doing a good job. As of that time, she had maintained the C-12 alone from her arrival in August 1992 until Stout's arrival in November 1992. Greenwell found Stout to be a poor performer who required specific instructions or "he wouldn't do anything." Although Stout and Greenwell got along at first, their relationship deteriorated rapidly after the home office suspended him twice in 1993, for time card falsification and for leaving early without completing assigned work.

**Acts of Discrimination and Sexual Harassment**

From the time of her arrival at Lakefront until her demotion and removal from the site two years later, Greenwell experienced a continuous atmosphere of gender-based hostility and harassment on the part of the Guard.[4] She never saw the Guard treat anyone else this way and she did not recall any females in supervisory positions at Lakefront. The Guard's hostile conduct toward her included:

* Greenwell encountered significant and ongoing obstacles in setting up the Raytheon workshop. Although the Guard was required under the contract to provide

---

[4] Petitioners argue that Greenwell's hostile environment claim is limited to a period of less than four months and includes only two specific acts of alleged sexual harassment. However, as detailed below, the Guard's conduct over a two year period constituted a continuing violation of federal and state law.

Raytheon with a work shop and furnishings, it assigned Greenwell a very small room in the hangar with bars on the windows, no air conditioning or office furnishings and only one small light on the ceiling. Greenwell reported these difficulties to House "numerous times." She described the condition of the Raytheon worksite when House first visited Lakefront as follows: "I had a cardboard box as a desk. I believe I might have had a milk crate for a seat . . . I had manuals just on the floor. We had no table, not really anything, just a telephone on the floor." Greenwell had previously asked a Guard representative if she could use a desk that was located upstairs in the hangar, but was told that it was reserved for someone. When House asked Babin if she could use the same desk, he said yes. Greenwell experienced this situation many times – her repeated requests to the Guard went unheeded until her male supervisor intervened. Similarly, the Guard typically went to Stout, Greenwell's subordinate, with concerns or requests instead of going directly to her.

* Guard officers repeatedly used demeaning language in the hangar to refer to Greenwell, both in and out of her presence. About a month and a half after Greenwell arrived, she was informed by a Guard officer that Mike Boudreaux, the Alternate C.O.R., had referred to her as "the BASI bitch."[5] Greenwell immediately reported

---

[5] Mike Boudreaux admitted that he referred to Greenwell as "the BASI bitch" to others on various occasions "in anger." According to the unrebutted testimony of another Guard officer, Greenwell was referred to as "the BASI bitch" a couple of times a day by various Guard mechanics working in the hangar throughout the two years that she worked at Lakefront.

this to both Babin and House. She and House met with Babin about this incident and, according to Greenwell, House told Babin that "[i]f Raytheon was to hear about this, there would be a lot of trouble."[6]

* On the very day that she reported the "BASI bitch" comment to Babin, one of Greenwell's car windows was broken. She reported this incident to Babin and received three different explanations from the Guard about how the window had been broken.

* Greenwell experienced a "lot of trouble" with the C-12's flight schedule. The Guard pilots repeatedly left in the C-12 in the morning and would not call to advise when they would return. As a result, sometimes Greenwell had to wait at the site all day or all night for the plane's return. This was "a continuous problem" throughout her two years there. She even bought a beeper and asked the pilots to call the beeper number and punch in their estimated return time, but the pilots used the beeper only for "a couple of weeks." Greenwell had never experienced such problems at other sites.

* In a discussion where Greenwell was inquiring about the possibility of other work space, a senior Guard officer told her, "[i]f I had my way with you, little girl, I'd stick you back in the building over there where no one had to look at you again." Babin referred to her in his presence as "BASI gal."

---

[6] The obvious implication of House's remark is that he did not report the incident to anyone at Raytheon. Greenwell was the only person who testified about this statement. Babin testified that he did not recall the discussion and Raytheon did not call House at trial.

* "Quite a few times" while Greenwell was working on the C-12 in the hangar, Guard officers would turn off the lights in the hangar which could not be turned back on for 20-30 minutes. Sometimes Guard officers locked the hangar doors or gate to the airport when they knew that she was working inside.

* In April 1994, the aircraft was temporarily moved to another location in the hangar. At the Guard's request, Greenwell and Stout had placed tape on the hangar floor to mark the temporary spot. After the plane was moved back to its regular spot, she and Stout were performing repairs on the aircraft. Babin approached Greenwell and began screaming and cursing at her to remove the tape from the floor. She advised him that the airplane was down for repairs that they were trying to complete. Babin cursed and repeated his command in a very loud and angry voice. This was the first request Greenwell received from a Guard officer to remove the tape.[7] After this demand from Babin, Greenwell and Stout discontinued their repairs to the aircraft and scraped the tape from the floor. Greenwell was required to report each month the number of Raytheon's hours at the site and classify the time as "reporting time" or "non-reporting time."[8] She

---

[7] As with other incidents, a Guard maintenance officer had previously told Stout, rather than Greenwell, to remove the tape. When Stout passed this on to Greenwell, she told him that they would scrape the tape up after they completed repairs which were required before the C-12 could fly.

[8] "Non-reporting time" was time when the aircraft was down, but which was not chargeable against Raytheon in computing the operational ready ("O.R.") rate. Under the contract, Raytheon was obligated to maintain an O.R. rate of at

reported two hours of non-reporting time on the April 1993 Monthly Status Report for time she and Stout spent scraping the tape from the floor. This angered Babin who called army officials at ATCOM; someone from ATCOM called the Raytheon home office.

* The climax of the Guard's hostile conduct occurred in July 1994 and precipitated Greenwell's demotion and removal from Lakefront. Five Guard officers wrote four letters to Raytheon complaining about her mechanical skills and personality. These letters contained 12 specific mechanical complaints, all but one of which had occurred in the 22 months *before* May 1994.

**Unheeded complaints of sexual harassment**

Greenwell enjoyed a good relationship with House and reported to him the Guard's pattern of harassment "every time, continually." House told her that he thought the Guard treated her that way because she was a woman. There was no evidence that House ever reported Greenwell's hostile environment complaints to anyone at Raytheon or took any steps to investigate the complaints.

House visited Lakefront 4-5 times and spent 2-4 days there on each visit. He noted on her August 30, 1993 evaluation that Greenwell had done "a good job" in the past year, that her "drive and initiative are noticed by all who come in contact with her at this site" and that her

---

least 80%, i.e., each aircraft had to be ready and able to fly at least 80% of the time. If the O.R. rate fell below 80%, Raytheon would be penalized. Throughout her two years as Leadperson at Lakefront, Greenwell maintained an O.R. rate of about 92%.

"technical and mechanical ability have improved greatly over the past year." House conducted a Quality Assurance Audit at Lakefront in November 1993, 16 months after Greenwell became Leadperson. She received an "excellent" administrative rating (for paperwork and beddown) and a "good" maintenance rating.

Wayne Leese became Greenwell's Area Supervisor in January 1994 and she met him in February 1994 when he made his first visit to Lakefront. The C-12 was gone during this visit, but Leese reviewed the site and aircraft records. He testified that "it appeared to [him] that she was doing quite well and it didn't [ ] appear to [him] that [he] had any problems at the site." Her next contact with Leese was a telephone call from him in late April 1994, after she had reported the tape scraping incident on the April 1994 Monthly Status Report. Greenwell described the conversation as follows:

> Q. . . . And what did he say?
>
> A. He told me that I should have never put two hours non-reporting time for scraping tape up on the status report, that Norris was very upset over it, that Norris called ATCOM, and ATCOM called BASI, and BASI told him, and not for me to do anything to get myself removed from that site. And I didn't understand that. I asked him what he meant and I told him what had been going on at Lakefront for the past almost two years with their attitudes and uncooperation and comments that they made towards me with not helping with flight schedules and just the whole gist of things. He didn't say much about that. He

just said, 'Well, just don't get anything to get yourself removed from the site.'

Q. Did you tell Mr. Leese everything that you had told Walt House that had happened?

A. Everything. Everything.

Q. Did you tell Mr. Leese why you thought the Guard treated you this way?

A. Yes. Yes.

Q. And –

A. I'm sorry. And I had told him that Walt House felt the same way; that they were treating me this way because I was a woman.

Q. And Walt House had told you that?

A. Yes, he had.

**The so-called "investigation"**

Leese then told his supervisor, Ron Paschal, about Greenwell's complaint and Pascal did think she was being harassed by the Guard. Leese then notified Bill Ogle, Raytheon's Director of Human Resources, of the complaint. Although Ogle told Leese to investigate the complaint and take necessary corrective action, Leese was not certain that Ogle even mentioned the subject of retaliation to him. Leese admitted that he took absolutely no steps to prevent the Guard from retaliating against Greenwell.

On May 4, 1994, about ten days after Greenwell reported the Guard's pattern of sexual harassment to him, Leese arrived unannounced at Lakefront and told

her that he was there to conduct a sexual harassment investigation. He first spoke to Greenwell who described their conversation as follows:

> He just wanted to know about the tape-scraping incident, the way Norris Babin talked to me, and the BASI bitch comment. That was all he asked me about. When he said he was there to do a sexual harassment investigation, I – I just – I didn't know – I didn't know what he meant by that, and he said, 'Do you consider BASI bitch being sexual harassment?' We discussed it, and I told him yes. He said, 'Do you consider the way Norris' tone of voice is sexual harassment?' And I asked him then, I said, 'Are you going to go in and talk to these people? Am I going to go in with you?' He said, 'Yeah, we're going to go talk to them.' And I said, 'Well, I don't want to use the word "sexual harassment", even though I feel it is sexual harassment, but I don't want to use that word. That will freak those guys out. I know them. I've worked here for almost two years.' I said, 'We can probably approach them a little different.' I said, 'Let's not use the word' – I said, 'if we use the words sexual harassment,' I said, 'bad things are going to happen to me here. I know that.' And he said, 'Do you think it's considered sexual harassment, his tone of voice?' I said, 'Yes, but I don't want to use those words.' That was the end of our conversation and he just focused on the BASI bitch, the harassment, and that was the end of that conversation.

Leese described the conversation as follows:

> I spoke to Kimberly about it and she reiterated the story regarding the tape on the floor,

> and she also discussed some of the other problems that she was having at the site. I don't recall all those right offhand. I do remember that she discussed the oxygen servicing problem and a few others, but I don't recall all of them right offhand.
>
> At that time, she also informed me that she didn't – didn't feel that – she didn't think it was a sexual harassment as such because it was maybe – I believe her exact words were that the – let me think a moment. Her words were that maybe sexual harassment would be too harsh of a term.

Leese then met separately with only two Guard officers,[9] Babin and Col. Philip Nuss, the State Aviation Officer, and admitted that he "told them that she had claimed sexual harassment but she had retracted her statement." Nuss understood that "that complaint was retracted by [Greenwell's] own volition." According to Babin, "I initially was accused, but I understand that it was recanted, or she retook that statement back." Leese testified that he "informed [Babin] that Kimberly had retracted the sexual harassment charge and basically was concerned about the loud tone of voice that he had used." Consistent with Leese's testimony was Babin's understanding that the basis of the retracted complaint was limited to his yelling and screaming at Greenwell about the tape scraping incident.

---

[9] Defendants misrepresent that "Leese interviewed several Guard employees, including Babin and Michael Boudreaux." Petition at 6. There is no evidence in the record that Wayne Leese interviewed anyone other than Babin and Nuss.

It was not until *after* Leese told Babin that Greenwell had made (and then supposedly retracted) charges of sexual harassment against him that Babin *for the first time* informed a Raytheon employee that the Guard was dissatisfied with Greenwell's mechanical skills.

No representative of the Guard had ever complained orally or in writing to Greenwell or to Raytheon about her mechanical skills *until after Babin was informed that Greenwell had made (and then supposedly retracted) a sexual harassment complaint against the Guard.*[10] Leese recalled at trial one specific complaint about Greenwell's mechanical abilities that Babin relayed to him in the May 4, 1994 conversation after Leese told him about her sexual harassment complaint. This concerned an incident where the brakes allegedly failed on landing. Babin testified that the incident occurred "in the beginning, probably in '92", but admitted that he had never documented it or reported it to anyone.

The next day, May 5, 1994, Leese met again with Nuss. Unlike the previous day's meeting where they discussed Greenwell's complaint, at the second meeting Nuss brought up *for the first time* alleged problems with her mechanical skills. After speaking with Nuss and Babin, Leese spent about 3-4 hours conducting an unannounced inspection of the C-12 and found about 94

---

[10] Babin had received a Customer Satisfaction Survey from Raytheon as early as November 1992, but disingenuously claimed that he did not return it to Raytheon because he "wanted to give her a chance" and he "didn't really feel like [he] wanted to give her a bad rating."

discrepancies.[11] Leese then told Greenwell that he had spoken to Nuss about her complaint and Nuss assured him that the Guard did not tolerate sexual harassment. Leese also told Greenwell that Nuss said that, if she would smile at the Guard a little more, she would probably fit in better. Leese also suggested that she laugh at the Guard's off-color jokes, even if she did not find them funny, so that she would fit in better.

Leese then discussed the discrepancies with Greenwell and Stout. After asking Stout how long he had been in aviation, Leese told him that, if he ever saw Greenwell looking like she didn't know what was going on, he should try to give her a hand. Leese then handed her a one page document entitled "Sexual Harassment Investigation" and asked her to read and sign it. Being "very upset" at Leese's bungling of the investigation in light of her fear of retaliation from the Guard, Greenwell "just looked at it and signed it." Although she had told Leese

---

[11] A discrepancy is "anything from a piece of paper on the carpet, chipped paint, anything that's not supposed to be on the aircraft." It can range from a very minor thing to a major problem. Leese testified that "it's not unusual to find discrepancies on an airplane. Every airplane that I inspect has discrepancies." To place the approximately 94 discrepancies into perspective, shortly after his May 1994 inspection at Lakefront, Leese conducted an announced inspection of a C-12 at Raytheon's Belle Chasse site and found about 500 discrepancies, including six "safety of flight" items, i.e., discrepancies which cause the aircraft to be grounded until corrected. During this same month, May 1994, a Quality Assurance Audit was performed at Lakefront by a Raytheon Q.A. inspector. Greenwell received an administrative rating of excellent and a maintenance rating of good or very good.

the details of the Guard's two year pattern of harassment, the document only mentioned the tape scraping incident and the "BASI bitch" comment.[12] This was the extent of Raytheon's "investigation" of Greenwell's complaint.

**Raytheon's retaliation against Greenwell**

The Guard's retribution was swift and direct. Ten weeks after Babin and Nuss were informed of her complaint (and supposed retraction), five Guard Officers sent four letters to Raytheon, complaining of numerous examples of Greenwell's poor maintenance skills and bad attitude. None of these five individuals (or any other Guard member) had ever previously complained to Raytheon about her mechanical abilities, and had only complained once to Raytheon about *any* non-mechanical matter involving Greenwell (the tape scraping incident). On July 22, 1994, copies of the letters were given to three Raytheon officials and Ogle. After reading the letters, the officials decided that Greenwell had to be demoted to mechanic and transferred to another site. They then spoke to Ogle to ensure that Human Resources concurred and asked him to join them for a meeting with Greenwell who was then at the home office.

---

[12] The document refers to the "BASI bitch" statement as though it were an isolated remark and stated "[t]he offensive statement by another national guardsman which occur[r]ed about eighteen months ago was sexual harassment." However, the evidence was unrebutted that the remark was made on a daily basis throughout Greenwell's two years at Lakefront. Despite the fact that Leese knew that Mike Boudreaux had referred to Greenwell as the "BASI bitch", he did not even bother to speak to Mike Boudreaux.

Ogle concurred in the transfer and demotion decision solely on the basis of the Guard letters. Paschal testified that, on the same day he read the letters, he had received third-hand, unverified information that indicated "poor maintenance" on the C-12's air conditioning system.[13] These three officials then met with Greenwell and told her that they had received letters from the Guard and, because of the letters, Raytheon had to transfer her. Greenwell responded that she knew this would happen after Leese used the term "sexual harassment" to the Guard. They also informed her of her demotion.[14]

At the time these three officials notified Greenwell of her demotion, none of them had ever been to Lakefront while she worked there. None of them had ever spoken to any of the five authors of the letters. None even knew if the five persons identified as authors of the letters actually were Guard officers at Lakefront. Not one of them spoke to House, her supervisor for three-fourths of the time covered by the complaints in the letters, although he was at the home office that day. None of them tried to

---

[13] The air conditioning system on the C-12 had been inoperative off and on for seven weeks prior to July 22, 1994. During that time, the a/c system was worked on by Greenwell, Stout and a Raytheon rover mechanic. In July 1994, a Guard officer made an emergency landing in Austin, Texas because he smelled smoke in the cockpit. When the C-12 landed in Austin, the C.O.R. only asked the Raytheon mechanic to look at the a/c system.

[14] Raytheon repeatedly refers to Greenwell's "transfer" and even misrepresents that her "transfer resulted in a $4,368.00 per year salary reduction." Petition at 8, n.13. Greenwell's *demotion*, not her legally-innocuous transfer, resulted in the salary reduction.

contact any of the five authors of the letters. Ogle and the two other Raytheon officials thought it was "kind of strange" that Raytheon received the first complaints from the Guard after Greenwell had been at Lakefront for two years.

One piece of information that the three men who decided to demote Greenwell did have was the fact that she had complained only ten weeks earlier of sexual harassment by the very authors of these letters. Prior to their meeting with Greenwell, the three officials discussed the fact that she had filed a complaint ten weeks earlier.

Although Raytheon's policy is to allow an employee to explain his or her side of the story when a customer requests the employee's removal from a site, Greenwell was not shown the letters at the meeting, was given no specifics of the complaints, and was not even told who had written the letters.

Following her demotion, Greenwell worked as a mechanic at the Raytheon site at Belle Chasse, Louisiana for 21 months. At the time of her demotion and transfer, the then Leadperson at Belle Chasse was transferred to Lakefront as Leadperson and Lance Fachman, then a mechanic at Belle Chasse, was promoted to Leadperson there. Greenwell then replaced Fachman, who became her new supervisor. In August 1994, three months after the "investigation" of her sexual harassment complaint, Greenwell received her first below satisfactory evaluation signed by Leese.

In the 21 months she worked at Belle Chasse, Greenwell got along well with the pilots and her co-workers. Fachman found her to be a productive worker with a positive attitude, pleasant to be around and a quick

learner. In October, 1994, she and another mechanic received a write-up from Fachman for a mechanical mistake (overtorquing bolts) which they readily admitted, upon questioning by Fachman. Fachman testified that he considered the mistake to be about a 4 or 5 on a scale of 1-10, with one being the least serious mistake. He considered the matter closed after he spoke to Greenwell and the other mechanic, they both admitted responsibility, and said it wouldn't happen again. Fachman wrote up the incident a month later, only after Ogle called him two times and urged him to write her up and Leese, his supervisor, told him two or three times to write up the incident "for the record" and send it to Ogle. Fachman admitted that he felt that his job security would be implicated if he didn't write her up.

After being told by Raytheon's Vice-President of Operations, John David Robinson, that she had to choose between the "career path" and the "litigation path," Greenwell resigned from Raytheon in April 1996 because she felt her career with Raytheon was over.

## B. PROCEDURAL HISTORY OF THIS CASE

After enduring almost two years of sex-based harassment at the hands of her employer's customer, followed by a humiliating demotion after her employer botched the investigation into her complaints, Kim Greenwell filed suit in United States District Court for the Eastern District of Louisiana alleging discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e, invoking the supplemental jurisdiction of the court to hear claims under Louisiana law, La. R.S. 51:2234 *et seq.* and La. R.S.

23:1006.[15] Following a five day trial, a seven person jury returned a verdict in favor of Greenwell on federal and state discrimination and retaliation claims, awarding her $100,000 in compensatory damages and $500,000 in punitive damages. The district court awarded an additional $7,520 in back pay, and denied all motions made pursuant to FRCP 50(a).

Post-trial, petitioners moved for judgment as a matter of law under FRCP 50(b), citing a total of nine arguments, seven of which sought relief due to insufficient evidence.[16] The trial court denied the motions, stating its "firm[ ] belie[f]" that sufficient evidence supported the jury findings.[17]

Petitioners sought relief on the identical sufficiency of the evidence grounds in the Fifth Circuit, which disposed of these arguments in a single sentence *per curiam* opinion.

Three of those same sufficiency of the evidence complaints appear again before this Court in the guise of conflicts in the circuits, both internal and external.[18]

---

[15] Greenwell's claims under La. Civ. Code art. 2315 for intentional infliction of emotional distress against her employer and Wayne Leese were eventually dismissed, as were all claims against Robinson, an additional defendant.

[16] The remaining two complaints dealt with the punitive damages award, which was remitted by the trial court in accordance with 42 U.S.C. § 1981a, and an evidentiary ruling which was deemed moot with the dismissal of claims against Robinson.

[17] *See*, Page 7a of Petitioners' Appendix.

[18] *See*, Page 5a of Petitioners' Appendix, numbers 1, 2, 3 and 4.

## SUMMARY OF ARGUMENTS FOR DENYING WRIT

Petitioners have done nothing more than recycle their sufficiency of the evidence arguments into standard of laws arguments, raising the specter of a "split in the circuits", in an attempt to gain this Court's review. To do this, petitioners have carefully dissected the evidence presented to the trier of fact, selecting only tidbits of testimony and documents to present to this Court, causing the case on which they seek review only vaguely to resemble the case as a whole which was presented to the jury. The determination of the jury was well supported by the factual findings which were reviewed by the trial court and affirmed on appeal. This Court's resources are best devoted to cases which present compelling reasons for review; the instant matter is not such a case.

## ARGUMENT

**I. Petitioners have failed to seek *certiorari* on the case that was presented to the jury for determination and reviewed by the district court and the court of appeals. Rather, petitioners have gleaned from a much broader factual presentation certain discrete propositions, which were found not credible by the trier of fact.**

**A. The jury heard evidence of a long-standing pattern of gender discrimination and sexual harassment which far exceeded the hostile environment claims presented by petitioners in seeking *certiorari*.**

The evidence presented at trial revealed a persistent history of discriminatory harassment due to Greenwell's

gender during the entirety of her tenure as Leadperson at Lakefront Airport. The jury heard testimony that Greenwell was referred to in derogatory terms in reference to her gender, such as "BASI Bitch" "BASI gal" and "little girl." Greenwell's subordinate, Stout, lamented in her presence that she was not Kim Basinger.

The evidence showed that Greenwell received no cooperation in setting up her shop at Lakefront Airport, and she eventually had to rely on her male supervisor, Walt House, to intervene and obtain the contractually agreed upon provisions to set up Raytheon's working space. The Guard further refused to acknowledge Greenwell's position as Leadperson by consistently failing to notify her of the flight schedule so that she could be present at the site to perform her duties. Nor was it uncommon for Greenwell's work to be deliberately interfered with by Guard members who would turn off the lights, lock her in the hangar, and lock the gates surrounding the facility, all after clearly observing her at work on the aircraft inside the hangar.

The Guard made no secret of its gender bias towards her when a Guard supervisor insisted their own male mechanic be brought over to "help" Greenwell troubleshoot a problem with the plane, despite the fact that Greenwell herself had barely begun to locate the difficulty, and actually solved the problem by the time the Guard's mechanic offered his advice. Indeed, the Guard's communications with Greenwell eventually all but

ceased, in favor of her male subordinate, Stout, while the consequences nevertheless flowed to Greenwell.[19]

Petitioners' version of the facts does not comport with those heard by the jury. When viewed in its entirety, the record is clear that Greenwell endured a persistent

---

[19] The jury heard Greenwell explain it as follows:

Q. Now, can you tell us about some of the things that happened during the first few months you were there? Did things ever change between you and the National Guard?

A. No. Things never changed. It was their same attitude, their same – the same lack of cooperation the whole almost two years I was there. It never changed. It would get better for a while, but it would always go back to where it was or worse.

. . .

Q. Did the National Guard officers ever show any attempts to make your job easier or to assist you in doing your job functions?

A. No. No, they did not.

pattern of harassment while Leadperson at Lakefront Airport. The findings of the jury and the holding of the Fifth Circuit do not create a conflict in the circuits, nor do they violate this Court's determination in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993).

**B. The facts of the so-called "investigation" by petitioners were presented in full to the trier of fact, which chose to disbelieve the version of events presented by petitioners both at trial and to this Court.**

Quite simply, the facts presented by petitioners for review by this Court were not the facts heard by the jury and reviewed by the trial court and the Fifth Circuit. The jury heard Greenwell explain that she complained continuously to her supervisor for almost eighteen months of the discriminatory treatment she suffered at the hands of the Guard.[20] Indeed, her previous supervisor often had to intervene on her behalf after learning of the customer's refusal to deal with a female Leadperson.

When Leese became Greenwell's new supervisor, she tried to apprise him of the gender-hostile environment she endured, and he chose to focus on only selected incidents, ignoring the pervasiveness of this behavior.

---

[20] Greenwell testified:

Q. All right. Now, prior to May 1st, 1994, this conduct or uncooperation and harassment that you've already described for the Jury, you had reported those to your area supervisor, Walt House, is that right?

A. Yes, I had, every time, continually.

When asked to explain this to the jury, Leese remembered that she had other complaints, but was unable to recall what they were. The jury was obviously able to contrast Leese's testimony with that of Greenwell, who had very precise recall of the events which took place during Leese's "investigation," and drew its own conclusions, based on these facts, about the effectiveness of petitioner's response to Greenwell's claims.

It is absurd, then, to assert that the steps taken by Leese in May of 1994, after *21 months* of this behavior, constitute prompt remedial action. Furthermore, the decision in this case does not hold an employer strictly liable for harassment, regardless of the employer's response. Instead, the trier of fact determined that petitioner failed to adequately address Greenwell's complaints for almost two years, and that the action taken by Leese after Greenwell informed him in detail about the environment she endured for two years was neither prompt nor remedial.

Petitioners' complaint is nothing more than that the jury did not believe their version of the story. There is no substantive holding as a result of the decisions below, nor is there a conflict among the circuits imposing an unreasonable burden on employers. This Court's review is therefore unwarranted in this case.

### C. The trier of fact heard a variety of evidence regarding petitioners' "legitimate business reason" for demoting Greenwell and chose to reject petitioners' proffered reason.

Of the three elements required to show a *prima facie* case of retaliation,[21] petitioner takes issue with the third, namely, that Greenwell failed to show a causal connection between her protected activity and her employer's adverse action. Remarkably, petitioners misrepresent that they presented "uncontroverted" proof that it had taken the same, if not more severe, action against other employees who had not engaged in a protected activity. Once again, the jury (and obviously the trial judge and the Fifth Circuit) heard otherwise.

Petitioners' own witness explained to the jury that it was Raytheon's practice to allow an employee to explain his or her side of the story when a customer requests the employee's removal from a site. However, that same witness, as well as Raytheon's own Director of Human Resources, admitted that Kim Greenwell was not allowed to give her side of the story prior to her demotion and removal from the site. At the meeting where she was demoted, she was not shown the letters written by the Guard, was not even told who authored the letters, and was given no specifics of the Guard's complaints.

---

[21] To demonstrate a *prima facie* case of retaliation, a plaintiff must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action following the protected activity; and (3) a causal link exists between the protected activity and the adverse employment action. *Nowlin v. Resolution Trust Corporation*, 33 F.3d 498 (5th Cir. 1994).

In contrast, the jury heard testimony and saw documents which showed that employees who had not filed discrimination or harassment complaints were given an opportunity to respond to customer complaints before any action was taken.[22] It was therefore within the jury's purview to disregard petitioners' proffered reason for Greenwell's demotion, that the customer requested it, and to logically infer that another, discriminatory, motive was at play. This is indeed the very function of the jury.

When the evidence is viewed as a whole, as the jury did, it is clear that no unrebutted or uncontroverted evidence went ignored by the jury, and thus gave rise to an erroneous decision which has created some internal conflict within the Fifth Circuit. Petitioners' argument on this issue is without merit and undeserving of this Court's review.

## II. Petitioners have re-fashioned the exact sufficiency of the evidence arguments presented in post-trial motions into questions on standards of law. These same questions were presented to and reviewed by both the district court and the Fifth Circuit as sufficiency of the evidence arguments, and were deemed by both to be without merit.

A brief inspection of petitioners' Appendix at pages 5a and 6a shows that the issues presented to this Court for review are nothing more than the recycled sufficiency of the evidence claims made by petitioners in post-trial

---

[22] Indeed, it was *petitioners'* own exhibits which detailed discussions with other employees about customer complaints before any action was taken.

motions. Petitioners' Argument I is a combination of item numbers 1 and 2 on Appendix page 5a; Argument II appears as item 3; and Argument III is a restatement of item 4.

The district court summed it up well in the following:

> Having presided over this trial, the court firmly believes that taking all the evidence in the light and with all reasonable inferences most favorable to plaintiff Greenwell, there is sufficient evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, and thus, the motions must be denied. In addition to there being sufficient evidence to support the jury's findings, the detailed interrogatories they completed certify that due consideration was given by them with respect to the claims of sexual harassment and retaliation against both Raytheon and Leese.

*See,* Petitioners' Appendix at page 7a.

## CONCLUSION

There is no need for this Court to revisit the sufficiency of the evidence claims made by petitioners in the courts below, regardless of the terms in which these arguments are couched by petitioners. For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of *certiorari* should not issue.

Respectfully submitted,

MAUREEN BLACKBURN JENNINGS
*Counsel of Record*
1503 Tchoupitoulas Street
New Orleans, Louisiana 70130
(504) 524-1040

TRACY A. BURCH
JONES, MITCHELL & BURCH
509 Market Street, Suite 730
Shreveport, Louisiana 71101
(318) 425-0870

*Counsel for Respondent,*
*Kimberly Ann Greenwell*

Supreme Court, U.S.
FILED
MAY 8 1998
CLERK

No. 97-1560

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

---

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
*Petitioners,*

v.

KIMBERLY ANN GREENWELL,
*Respondent.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PETITIONERS' REPLY BRIEF

---

ARMIN J. MOELLER, JR.
*Counsel of Record*
M. NAN ALESSANDRA
PHELPS DUNBAR, L.L.P.
Suite 500
MTEL Centre North
200 South Lamar Street
Jackson, MS 39201
(601) 352-2300
*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| I. THE RESPONDENT CANNOT RELY ON TIME-BARRED ACTS OF ALLEGED HARASSMENT TO ESTABLISH HER HOSTILE ENVIRONMENT CLAIM | 1 |
| II. THE NON-TIME-BARRED CONDUCT CANNOT SATISFY THE OBJECTIVELY HOSTILE OR ABUSIVE WORK ENVIRONMENT STANDARD | 4 |
| III. RESPONDENT CANNOT RELY ON WALT HOUSE'S ALLEGED INACTION TO SUPPORT HER HOSTILE ENVIRONMENT CLAIM | 6 |
| IV. RAYTHEON'S ALLEGED FAILURE TO OFFER GREENWELL A REBUTTAL OPPORTUNITY DOES NOT ESTABLISH RAYTHEON'S LIABILITY FOR RETALIATION | 8 |
| CONCLUSION | 9 |

## TABLE OF AUTHORITIES


| FEDERAL CASES | Page |
|---|---|
| *Ellerth v. Burlington Industries*, S. Ct. Case No. 97-569 | 5 |
| *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993) | 4, 5, 6, 9 |
| *United Airlines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885 (1977) | 2, 7 |
| *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 1998 WL 175313 (5th Cir. 1998) | 7 |
| **FEDERAL STATUTES** | |
| 42 U.S.C. § 2000e-5(e)(1) | 3 |
| **FEDERAL RULES** | |
| Fed. R. Civ. P. 51 | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

---

No. 97-1560

---

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
*Petitioners,*

v.

KIMBERLY ANN GREENWELL,
*Respondent.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## PETITIONERS' REPLY BRIEF

---

### I. THE RESPONDENT CANNOT RELY ON TIME-BARRED ACTS OF ALLEGED HARASSMENT TO ESTABLISH HER HOSTILE ENVIRONMENT CLAIM

Greenwell argues that Raytheon has erroneously restricted the period of time for evaluating the Guard's alleged harassment to a four month period between April 1, 1994 and July 22, 1994. *See* p. 4, n.4 of Brief in Opposition. However, it was not Raytheon which imposed this time restriction. Instead, the district court correctly limited the jury's consideration of the Guard's conduct to this period when it instructed the jury as follows:

> You, the jury, are called upon to determine whether defendants at any time after April 1, 1994 discriminated against and/or harassed the plaintiff because

> she's a woman and/or retaliated against the plaintiff because of her harassment complaints. Although the parties have presented evidence concerning conduct or action which occurred prior to April 1, 1994, **you are not called upon to determine whether that conduct constitutes discrimination, harassment and/or retaliation or whether any damages should be awarded for that conduct.** However, you may consider the evidence of pre-April 1, 1994 conduct as circumstantial evidence which tends to prove or disprove that the conduct which occurred or allegedly occurred after April 1, 1994 was discriminatory and/or harassment and/or retaliatory. You may give the evidence of pre-April 1, 1994 conduct whatever weight you believe it deserves.

The Court further instructed the jury that:

> To prevail against Raytheon on her claim of harassment, plaintiff must prove by a preponderance of the evidence each of the following elements: (1) that plaintiff is a member of a protected class. In this case, the parties have stipulated that she's a member of a protected class. (2) that **after April 1, 1994,** plaintiff was subjected to harassment by either Raytheon employees or Guard personnel; (3) that the harassment complained of is based upon the fact that plaintiff was a woman; (4) that the harassment complained of affected a term, condition or privilege of employment, i.e., that the harassment was sufficient to alter the conditions of employment and create an abusive work environment; and (5) that the employer knew or should have known of the [post-April 1, 1994] harassment in question and failed to take immediate action.

These instructions were provided to the jury because Greenwell did not file her EEOC charge until January 6, 1995 thereby limiting the period of actionable harassment to 300 days before the charge was filed. *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889

(1977).[1] The Respondent asserts that the jury could have relied on such time-barred acts of harassment because the Guard's conduct constituted a "continuing violation." *See* Brief in Opposition at p. 4, n.4. However, Greenwell never asserted this theory, or objected to the district court's above referenced instruction, until after this case was appealed. Accordingly, Fed. R. Civ. P. 51 precludes Greenwell's reliance on the continuing violation exception as a means to circumvent Title VII's statute of limitations.[2]

Since the jury could not have relied on the pre-April 1, 1994 conduct as proof of actionable harassment, the only two acts of harassment which the jury could have based its verdict on were: (1) the April 1994 tape scraping incident;[3] and (2) the "Kim Basinger" comment.[4] Pursuant to the district court's instruction, the jury could have only used the pre-April 1, 1994 conduct as "circumstantial evidence which tends to prove or disprove that the conduct which occurred or allegedly occurred after April 1, 1994 was discriminatory and/or harassment." In other words, the jury could have only relied on the pre-April 1,

---

[1] Since Greenwell filed her charge with a state agency, the limitations period was extended to 300 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[2] Raytheon also denies the applicability of the continuing violation theory to this case. However, since the plaintiff never raised that issue before the district court, it need not be addressed herein.

[3] The April 1994 tape scraping incident refers to Norris Babin's allegedly loud request for Greenwell to remove some tape from the hangar floor.

[4] The Kim Basinger incident refers to Greenwell's subordinate's, Jim Stout's, statement that he wished Kim Greenwell were Kim Basinger. Although the record does not reflect when Stout made this statement, Raytheon addresses it herein to afford the jury's verdict the most favorable light.

1994 conduct to determine whether the post-April 1, 1994 conduct was sex-based and intentional.[5]

Naturally, Greenwell has attempted to bury this critical distinction throughout her Brief in Opposition. However, once this dispositive issue is brought into focus, it is readily apparent that both the district court and the Fifth Circuit deviated from this Court's directive in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370 (1993), in finding that the non-time-barred conduct meets the objectively hostile work environment standard.

## II. THE NON-TIME-BARRED CONDUCT CANNOT SATISFY THE OBJECTIVELY HOSTILE OR ABUSIVE WORK ENVIRONMENT STANDARD

Assuming *arguendo* that the non-time-barred conduct was sex-based and intentional,[6] it is still wholly insufficient to satisfy the *Harris* court's objectively hostile work environment standard or the standard adopted by the Circuits subsequent to *Harris*. *See* p. 13 of Petition for Certiorari. The Respondent also contends that the Fifth Circuit's decision on this issue does not create a conflict in the Circuits because the lower court merely rejected Raytheon's sufficiency of the evidence argument without articulating any conflicting standard of law. *See* p. 20, 26-27 of Brief in Opposition. Even if the Fifth Circuit did not identify

---

[5] This instruction was consistent with this Court's longstanding precedent that "a discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Airlines, supra* at 558.

[6] Again, the only alleged acts of non-time-barred conduct were Norris Babin's loud request for Greenwell to remove tape from the hangar floor and Jim Stout's statement that he wished Kim Greenwell was Kim Basinger. As previously referenced, the alleged harassment ended on July 22, 1994, the date that Greenwell was transferred from the Lakefront facility, the only facility at which she was allegedly subjected to a hostile work environment.

the legal basis for its holding, the effect of its decision is nonetheless explicit: an employee can recover for hostile work environment sexual harassment by relying on a few isolated instances (in this case, two) of alleged verbal harassment/teasing [7] uttered over a lengthy period of time. This holding clearly contradicts the Fifth Circuit's, as well as the other Circuits', standard of liability for hostile work environment claims. *See* p. 13 of Petition for Certiorari. Further, if the non-time-barred conduct described herein is sufficient to satisfy *Harris*' objectively abusive conduct standard, then employers' liability for such claims has become virtually limitless. Clearly, Congress did not intend for Title VII to be expanded to this degree when it created the statute in 1964.[8]

Greenwell also apparently relies on the Guard's July 1994 complaint letters as evidence supporting the objectively abusive conduct element of her hostile environment claim. *See* p. 8 of Brief in Opposition. However, such evidence is likewise insufficient to support this element of Greenwell's hostile environment claim. *See* p. 13-14 of Petition for Certiorari.

Finally, although the pre-April 1, 1994 conduct need not be considered because it is time-barred, the Court should be aware of a fact that Respondent consistently attempts to gloss over throughout her Brief in Opposition. Greenwell repeatedly asserts that the Guard directed derogatory language at her while in her presence. *See* p. 5-6 and 20-21 of Brief in Opposition. Clearly, Respondent

---

[7] Stout's comment was at worst, minor teasing, which Greenwell remedied herself by rebuking her subordinate, Mr. Stout.

[8] The lower court's decision in this case is the type of decision which has created substantial uncertainty among the Circuits and the public regarding an employer's liability for sexual harassment. Indeed, recent questioning during the April 22, 1998 oral argument in *Ellerth v. Burlington Industries, Inc.* (S. Ct. Case No. 97-569) reflects this Court's uncertainty regarding the origin of this whole body of law. *See* 78 DLR A-1 1998 (BNA).

has taken definite liberties with the record as confirmed by the following excerpt from her trial testimony:

> Q. And didn't Col. Nuss tell you there was going to be a change of attitude and he would see to it that no comments such as the BASI-bitch comment was ever made again?
>
> A. Yes. And he was also referring to Maj. Mix calling me the little girl, saying he'd stick me over there in the building over there where no one would have to see me again, that, also.
>
> Q. That also occurred prior to September 29, 1992?
>
> A. Yes.
>
> Q. And those incidents, BASI-bitch, little girl, never happened after September 29, 1992, again, did they?
>
> A. To my face, I **never** heard—no one—I **never** heard any comments that they were making.

Thus, even if the time-barred conduct were considered, statements such as the ones alleged herein cannot satisfy *Harris*' objectively hostile work environment standard, especially when such statements were not even made in the plaintiff's presence.[9]

## III. RESPONDENT CANNOT RELY ON WALT HOUSE'S ALLEGED INACTION TO SUPPORT HER HOSTILE ENVIRONMENT CLAIM

Respondent relies heavily on her first supervisor's, Walt House's, alleged inaction in responding to her purported complaints to him about the Guard's conduct towards her between September 1992 and December 1993.[10] Green-

---

[9] Greenwell's admission that these statements were not made in her presence likewise precludes her ability to prove that such comments created a subjectively hostile work environment, which is another mandatory element of her claim. *Harris, supra* at 21-22.

[10] House was transferred to a different area in January 1994. Wayne Leese thereafter transferred into the vacancy created by House's departure.

well's reliance on such evidence is both legally and factually incapable of establishing Raytheon's liability.

First, House's alleged inaction is again irrelevant and incapable of establishing Raytheon's liability because "a complaint about time-barred conduct does not satisfy the employee's duty [under Title VII]." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 1998 WL 175313 (5th Cir. 1998); *See also United Airlines, supra* (finding that time-barred conduct is not actionable).

Second, if House's action was so utterly deficient, then Greenwell admittedly could have sought redress from any or all of the following Raytheon employees: (1) the Administrator of Personnel; (2) the Director of Human Resources; (3) Walt House's supervisor; or (4) the President of Raytheon.[11] Moreover, Greenwell informed her psychological counsel that Walt House did a good job controlling the Guard and that the Guard's allegedly harassing conduct did not begin until March 1994, some three months after House had been transferred from Greenwell's area. Accordingly, Greenwell's reliance on House's alleged inaction is both legally and factually inapposite.

Since House's alleged non-responsiveness could not establish Raytheon's liability, Greenwell had to prove that Wayne Leese's alleged inaction established Raytheon's liability. Greenwell only takes issue with the adequacy, not the promptness of Leese's investigation.[12] However, the adequacy of Leese's investigation could only be questioned if the Guard harassed her between May 4, 1994 (date of investigation) and July 22, 1994 (date of trans-

---

[11] Also, Greenwell admittedly knew about a toll free ethics hotline to which she could have complained about House's alleged inaction.

[12] Greenwell testified about Leese's May 1994 investigation as follows:

> Q. So you complained and promptly, pursuant to policy, this company launched an investigation.
>
> A. Yes. On this time they did.

fer from Lakefront). The undisputed evidence is that no such harassment occurred during this period. Accordingly, if an employer can still be subjected to liability following a prompt investigation which results in termination of the allegedly offensive conduct, then, contrary to Greenwell's assertion, an employer will be strictly liable whenever an employee lodges a complaint about sexual harassment. Again, Congress could not have intended such an anomalous result when it enacted Title VII.

## IV. RAYTHEON'S ALLEGED FAILURE TO OFFER GREENWELL A REBUTTAL OPPORTUNITY DOES NOT ESTABLISH RAYTHEON'S LIABILITY FOR RETALIATION

Greenwell's sole argument in support of her retaliation claim is that Raytheon offered other employees, who had not complained about harassment, an opportunity to rebut the customers' complaints, whereas it did not offer her this opportunity. While Raytheon's Operations Manager testified that employees are sometimes allowed "to explain [their] side of the story", he also testified that Raytheon would have still demoted Greenwell, irrespective of her rebuttal, because the customers' safety is always paramount.[13] Moreover, Greenwell was afforded an opportunity to rebut the Guard's letters, and although she drafted a response letter, she refused to allow Raytheon's Operations Department to review her letter. Thus, if anyone precluded her rebuttal opportunity, it was Greenwell herself.

Finally, even if other non-complaining employees were given opportunities to rebut customers' complaints, the

---

[13] The only event which could have prevented Greenwell's transfer and demotion was the Guard employees' withdrawal of their complaints. This was primarily due to the serious nature of the Guard's complaints and because Raytheon's own mechanic had independently corroborated the Guard's most serious complaint, the dangerously deficient maintenance of the C-12's air conditioning system.

critical, uncontroverted fact remains that Raytheon either discharged or demoted each of those employees just as it had demoted Greenwell. Since this is the only relevant adverse employment action, then the applicable law would still preclude Raytheon's liability for retaliation. *See* p. 20-21 of Petition for Certiorari. As such, the lower court's ruling conflicts with the other Circuits' decisions, as well as the Fifth Circuit's existing precedent. *Id.*

## CONCLUSION

Before this term ends, this Court will decide four cases addressing an employer's liability for sexual harassment. Although each of those cases concern important issues, Petitioners assert that none of those cases address an issue any more important than the one raised herein, namely, the conduct necessary to create an objectively hostile and abusive work environment. That issue is of utmost importance because it is the starting point for determining an employer's liability in the vast majority of these cases. Presently, however, the applicable legal standard is a moving target which neither the courts nor the public truly understand as evidenced by the jury's decision herein, and the number of cases presently under review by this Court and the Circuit Courts. This Court will not see another case which so clearly falls short of its own standard in *Harris,* or which warrants clarification of the *Harris* hostile work environment standard. If, as in this case, an employer is liable for subjecting an employee to two minor acts of alleged actionable conduct over a four month period, then there is truly no limit to an employer's liability. Accordingly, Petitioners respectfully request that the Court grant a writ of certiorari.[14]

---

[14] Petitioners in no way intend to diminish the other reasons for granting certiorari in this case, but merely stress the importance of addressing the hostile work environment standard under the facts of this case.

Respectfully submitted,

ARMIN J. MOELLER, JR.
*Counsel of Record*
M. NAN ALESSANDRA
PHELPS DUNBAR, L.L.P.
Suite 500
MTEL Centre North
200 South Lamar Street
Jackson, MS 39201
(601) 352-2300
*Attorneys for Petitioners*